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In the

# Supreme Court of the United States

OCTOBER TERM, 1989

LOCAL 530 OF OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION,

*Petitioner,*

*v.*

DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK, LOCAL 1974,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## Questions Presented

1. May a district court employ the "potent power" of civil contempt to impose substantial penalties on a labor union for violating an injunction that did not provide the union fair notice of the conduct it purported to prohibit?

2. May the sanctions of civil contempt be levied upon a union for failing to take steps pursuant to a duty that the lower courts recognized only could be inferred from the language of the injunction?

3. May a court of appeals affirm a judgment of civil contempt based on conduct as to which there were no findings in the district court and as to which there was no briefing or argument on appeal?

4. May a district court order a labor union to prevent its members from joining a second union or, alternatively, working without any union affiliation pursuant to 29 U.S.C. § 411(a)(2) when the jurisdiction of the district court was limited to policing the jurisdiction of the labor union itself?

## List of Parties

The parties to the proceedings below were the petitioner, Local 530 of Operative Plasterers and Cement Masons International Association ("Local 530"), and two of its officers, Michael Canuso and Louis Moscatiello, in their representative capacities; the respondent, Drywall Tapers and Pointers of Greater New York, Local 1974 ("Local 1974") and two of its officers, John Alfarone and Daniel Jones, in their representative capacities, as well as the following individuals and entities against whom the district court entered contempt judgments: Louis Moscatiello, B-Drywall Finishers, Joseph Ianno, Woodworks Construction Company, Harold Heustein, Robert Goldman, Improved Drywall, Inc., and Robert Vergara. The only parties before the Court are petitioner, Local 530, and respondent, Local 1974.

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OCTOBER TERM, 1989

LOCAL 530 OF OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION,

*Petitioner,*

*v.*

DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK, LOCAL 1974,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Local 530 of Operative Plasterers and Cement Masons International Association, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-entitled proceeding on October 23, 1989.

### Opinions Below

The opinion of the Court of Appeals for the Second Circuit, as well as the dissent of Judge Daniel J. Mahoney, which are not yet reported, are reprinted as Appendix A, *infra*. The unreported order of the Second Circuit denying petitioner's motion for rehearing and rehearing in banc is reprinted as Appendix B, *infra*. The memorandum decision of the United States District Court for the Eastern District of New York is reprinted as Appendix C, *infra*, and the judgment of contempt entered by the district court is reprinted as Appendix D, *infra*.[1]

[1] Citations to the paginated appendices will be referred to as "_a".

## Jurisdiction

The judgment of the United States Court of Appeals for Second Circuit was entered on October 23, 1989. A request for rehearing or, in the alternative, rehearing in banc was denied by order entered on December 11, 1989. This Court has jurisdiction to review the issue presented herein by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

## Federal Statutes Involved

Rule 65(d) of the Federal Rules of Civil Procedure and 29 U.S.C. § 411.

# STATEMENT OF THE CASE

## Preliminary Statement

Petitioner Local 530 has been held in civil contempt upon the district court's finding that it violated an injunction entered to enforce an arbitration decision that prohibited Local 530 from exercising union jurisdiction over work at particular construction sites. The judgment of civil contempt was based upon the district court's finding that, during the year following the entry of the injunction, Local 530 failed to discipline certain of its members who worked at sites covered by the injunction. The court made this finding despite the uncontested evidence that, to the extent that any Local 530 members worked at these sites, they did so only as members of another union or as non-union workers. Local 530's purported obligation to discipline its members was not set forth in the language of the injunction.

On appeal, the panel majority affirmed the judgment of contempt, though it based the affirmance, at least in part, on a finding that Local 530 had disobeyed the injunction by actually exercising union jurisdiction at prohibited sites. This finding by the appellate majority was not supported by any findings of fact and was neither briefed

nor argued on appeal. Further, despite the clear requirements of prior decisions of this Court and of Rule 65(d) of the Federal Rules of Civil Procedure that injunctions must clearly state their requirements and prohibitions, the appellate majority did not find that the injunction clearly set out the discipline obligation. Instead, the court only found that Local 530 should have inferred such an obligation. Because of these findings, the members of Local 530 now face the prospect of having their union treasury depleted by almost $700,000 in damages and attorneys' fees because of the failure of Local 530's officers to perform certain acts that were not described in an injunction and which, at best, only could be inferred from its language.

**1. Background of the Injunction.**

This contempt proceeding is part of an historical rivalry between two construction trades (plasterers and painters) over the representation of workers engaged in the preparation of drywall for painting. During the 1970's, this rivalry was extended to a dispute as to union jurisdiction over a newly developed technique for preparing drywall whereby the entire drywall surface was skim-coated with taping material. In 1977, the Building Trades Department of the AFL-CIO appointed a National Hearings Panel to determine the allocation of jurisdiction between the two unions. By decision dated March 31, 1978, binding on both trades, the National Hearings Panel awarded jurisdiction over certain work to the Plasterers Union and its locals such as Local 530, and other drywall finishing work to Painters locals such as Local 1974. *See, Drywall Tapers & Pointers of Greater New York, Local 1974 v. Operative Plasterers and Cement Masons International Association,* 601 F.2d 675 (2d Cir. 1979), *cert. denied,* 444 U.S. 1073 (1980) (4a-5a, 31a).

Local 1974 commenced the underlying lawsuit in 1981 alleging that all work being performed in New York by members of Local 530 was of the type allocated to Painters unions under the Hearings Panel decision and a subse-

quent arbitration decision. On three separate occasions between 1981 and 1983, Local 1974 then moved for a preliminary injunction barring Local 530 from asserting jurisdiction over any drywall finishing work in New York. On each occasion, the district court denied the motion on the grounds that: (1) under the 1978 Hearings Panel Decision, Local 530 could properly assert jurisdiction over work known as skim-coating; and (2) if Local 1974 believed that Local 530 was improperly asserting jurisdiction, a complaint must be made in the first instance to the Building and Construction Trades Council of Greater New York ("BCTC"), the industry body entrusted with the responsibility of resolving such jurisdictional complaints (6a).

In October 1983, Local 1974 filed a jurisdictional challenge with the BCTC claiming that Local 530 was improperly asserting jurisdiction over workers engaged in drywall finishing work at thirty-one (31) specific construction sites. The BCTC held a hearing and ruled only that Local 530 could no longer exercise union jurisdiction over the drywall preparation work performed at these sites (6a, 32a).

**2. The Issuance of the Injunction.**

Local 1974 then brought another motion for a preliminary injunction pursuant to Rule 65(d) of the Federal Rules of Civil Procedure restraining Local 530 from exercising jurisdiction over any drywall finishing work in New York. On January 9, 1984, the district court issued a preliminary injunction enforcing the BCTC jurisdictional decision and limited to those sites specifically covered by the BCTC award. The preliminary injunction ordered:

> "that defendant Local 530 . . . its officers, agents, servants, employees and attorneys, and all persons in active concert or participation with any of them who receive actual notice of this Order . . . by and hereby are enjoined and restrained *from asserting jurisdiction over, and, from causing or*

*permitting members of such labor union to perform work at any of the following job sites . . .* " (emphasis added) (6a-7a, 33a).

The district court then issued a permanent injunction, again limited to those sites covered by the BCTC award and otherwise identical to the language of the preliminary injunction (7a, 33a).

**3. Local 530's Efforts to Comply with the Injunction.**

When the preliminary injunction was entered, Local 530 sent a letter to its members and to contractors notifying them of the injunction, advising them that Local 530 no longer could exercise jurisdiction at the sites, and instructing its members to comply with the injunction.[2] All work was then suspended on these jobs (7a).

Once the work at the sites ceased, Local 530 never again exercised any jurisdiction over the sites. It reiterated at membership meetings that Local 530 could not assert jurisdiction over the jobs and that its members could not work on the jobs through Local 530 or as Local 530 men. Further, as the record below established, after the entry of the preliminary injunction, Local 530 did not collect dues or fringe benefit payments relating to drywall preparation work at these sites, nor did it act as the representative of any workers at these sites.[3]

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[2] At the time of the injunction, Local 530 had approximately 300 members working at various sites in New York, including those covered by the injunction. Post-injunction, Local 530 contractors continued to assign Local 530 members to non-prohibited sites and continued to remit dues check-offs and fringe benefit payments to Local 530's welfare fund (7a-8a, 24a).

[3] The appellate court majority, in affirming the judgment of contempt, found that Local 530 had exercised jurisdiction by intentionally collecting dues for work performed at prohibited sites (8a, 9a, 16a). As Judge Mahoney points out in his dissent, there is no basis in the record for the majority's finding and, in fact, Local 530 did not exercise jurisdiction after the entry of the injunction (24a). Thus, Local 530 has been held in contempt for doing what it did not do.

At the time of the injunction, the work at fourteen of the sites was being performed by one of three contractors —Improved Drywall, Woodworks Construction and Primo Construction Corp.—each of which operated under collective bargaining agreements with Local 530. Upon learning of the injunction, these contractors ceased work at their sites (93a, 97a, 101a). Approximately six weeks after the entry of the preliminary injunction, Improved and Woodworks separately entered into collective bargaining agreements with Teamsters Local 272 to represent their drywall finishing employees (93a, 99a). Members of Local 530 then jointed Local 272 and returned to work at prohibited sites exclusively as members of Local 272. All dues and fringe benefit payments for this work were remitted by Improved and Woodworks to Local 272, and Local 530 did not exercise jurisdiction over these sites.[4]

**4. The Contempt Proceedings.**

***a. The First Contempt Motion.***

On February 14, 1984, Local 1974 moved by Order to Show Cause to have Local 530 and four contractors held in contempt, alleging that Local 530 had asserted jurisdiction over prohibited sites (34a). This motion, based on observations made by Local 1974 officials at prohibited sites, alleged that workers known to have been members of

[4] Woodworks also resumed one of its two jobs on a non-union basis. At the hearing below on the contempt motion, Local 530 and Woodworks learned for the first time that Woodworks had mistakenly remitted to Local 530 dues and fringes for 945 (out of more than 10,000) post-injunction hours of work performed by five employees at this job (16a, 24a). Despite the fact that the district court did not base its contempt finding in any way on this obviously unintentional mistake, the appellate majority found it somehow to represent an exercise of Local 530's jurisdiction and, therefore, contumnacious conduct. As Judge Mahoney states in his dissent, this finding is inconsistent with the factual record and also ignores the *de minimis* and unintentional nature of the conduct (24a).

Local 530 had been observed working at three of the prohibited sites and that Local 530 was, therefore, still asserting jurisdiction over the sites (8a).

It quickly became apparent that Local 1974 could not prove that the men observed at the sites were working under the aegis of Local 530. The district court was told by counsel to Local 530 that Local 530 was not exercising jurisdiction over the work at these sites and that these men were working as members of another union. The contempt motion was denied, and Local 1974 was directed to conduct discovery into the affiliation of the workers at the prohibited sites (8a-9a, 34a-35a).

***b. The June, 1985 Contempt Motion.***

By motion dated June 24, 1985, by which time all of the prohibited jobs were completed, plaintiff renewed its contempt motion, again alleging that Local 530 had violated the injunctions by asserting jurisdiction over the sites through the receipt of payments on behalf of its members (35a). The parties then appeared before the district court to commence a hearing on this second contempt motion. Plaintiff's counsel initially represented that he would prove that employers at prohibited sites had sent work dues and made fringe benefit contributions to Local 530 for work done at those sites by members of Local 530 (9a). Counsel for Local 530 represented that, to the contrary, Local 530 had not received any work dues or fringe benefit payments for any work at these sites and that the work at the prohibited sites was, in fact, performed exclusively on a non-union basis or under the jurisdiction of Teamsters Local 272.

At this point, counsel to Local 1974 shifted theories and argued that the injunction prohibited current Local 530 members from working at the sites even if they were working in a clearly non-Local 530 capacity. Confronted with this argument for the first time, the district court

itself expressed doubt that its injunction clearly and unambiguously prohibited employers from hiring Local 530 members, so long as they were working non-union or under the auspices of some other union. In fact, confronted with plaintiff counsel's theory that the injunction was violated merely by a Local 530 member working post-injunction at a prohibited site, even though the work was performed as a member of a Teamster's local, the district court observed, after reviewing the text of the injunction, "So I have to *construe* the order." (Emphasis added).

**5. The Decisions Below.**

***a. The District Court Decision.***

In light of the irrefutable evidence that Local 530 had not exercised jurisdiction over the prohibited sites, the sole issue on the contempt motion became whether the injunction, by the use of the phrase "cause or permit," imposed on Local 530 some duties or responsibilities to take action against members who returned to work at prohibited sites in non-Local 530 capacities (22a, 61a-66a). Despite the fact that the injunction was completely silent on this subject and despite the fact that basic principles of constitutional and labor law constrain unions from interfering with members joining a second union or working non-union, the district court found that such a duty was clearly and unambiguously created by the injunction (62a, 65a). According to the district court, Local 530 should have threatened members who wished to work at prohibited sites with expulsion from Local 530 if they refused to resign (67a, 69a). The district court held that it was insufficient for Local 530 merely to withdraw totally from the sites, and thereby lose both the income and prestige attendant to exercising jurisdiction. Instead, the district court held that the phrase "cause or permit" clearly and unambiguously instructed Local 530 that it was to interfere actively in the efforts of its members to increase their employment opportunities by joining a second union or by working non-union (69a). Local 530

was, thus, held in civil contempt for failing to take such action and as a result held responsible for more than $540,000 in damages and more than $150,000 in legal fees (112a-116a).

***b. The Appellate Court Decision.***

The Court of Appeals majority, despite affirming the judgment of contempt, did not explicitly agree with the district court that the injunction clearly and unambiguously set out the "resign or be disciplined" obligation. Instead, it held first that certain post-injunction conduct of Local 530 demonstrated that the union had inferred the "resign or be disciplined" obligation from the injunction (14a). However, the appellate majority did not rest its holding only on this rationale. It also found that Local 530, in fact, exercised jurisdiction over the prohibited sites by intentionally collecting dues check-offs and fringe benefit payments from contractors working at prohibited sites (16a). However, as noted above, and by Judge Mahoney in his dissent, there is no factual basis for this finding (24a).

In his dissent, which Local 530 urges this Court to adopt in reversing the judgment of contempt, Judge Mahoney criticizes the majority's finding that Local 530 exercised jurisdiction over prohibited sites. First, he questions the wisdom of addressing the issue at all in light of the fact that the district court had not made such a finding and in the absence of briefing or argument on the subject (23a-24a). Secondly, he notes that the three factors pointed to by the majority as demonstrating the exercise of jurisdiction are either irrelevant, unsupported by the record, or, in the case of the unintentional remittance of payments for 945 hours of work, illustrative of substantial compliance, not of willful contempt (24a).

As to whether the "cause or permit" prong of the injunction clearly directed Local 530 to police the job sites and discipline errant members, Judge Mahoney found that

the injunction failed to notify Local 530 adequately of these obligations. Under Judge Mahoney's analysis, Local 530 could not discern this obligation from the terms of the injunction itself nor were the obligations made obvious by the spirit and purpose of the injunction. Thus, according to Judge Mahoney, the "potent weapon" of contempt was improperly used against Local 530 and the judgment should be reversed (25a-26a).

## REASONS FOR GRANTING THE WRIT

### I

### In affirming the judgment of contempt, the Court of Appeals has ignored the governing decisions of this Court that an injunction must clearly set forth the conduct being outlawed or required.

Rule 65(d) of the Federal Rules of Civil Procedure requires that injunctions "be specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained." (118a) As this Court has frequently held these specificity provisions of Rule 65(d) are "no mere technical requirements," but are designed to "prevent uncertainty and confusion on the part of those faced with injunctive orders. . . . " *Schmidt v. Lessard*, 414 U.S. 473, 476 (1984). Indeed, Rule 65 merely prescribes the basic due process requirement of fair notice:

> Since an injunction order prohibts conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed. *Id.* (footnote omitted)

In this case, Local 530 and its members never received notice that the injunctions required Local 530 members to resign from Local 530 if they wished to return to work at a prohibited site in some capacity other than as a Local 530 member. Further, Local 530 never received notice that it could be held in contempt if it did not affirmatively seek

out and question the identity and union membership of men working non-union or as members of a Teamsters local which was lawfully representing workers at the sites. Thus, the injunction directly contravened this Court's admonition that:

> "the person enjoined must nevertheless receive fair and precisely drawn notice of what the injunction actually prohibits." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters,* 415 U.S. 423, 444 (1974).

The issues in this case go directly to the heart of Rule 65(d) and the potential abuse of the contempt power. Local 530 has been held in contempt for its failure to engage in conduct which is nowhere compelled by the language of the injunction. Thus, the concern addressed by this Court in reversing another imprudently issued contempt decree against a labor union is again apt:

> The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid. *International Longshoreman's Association, Local 291 v. Philadelphia Marine Trade Association,* 389 U.S. 64, 76 (1967).

In affirming the judgment of contempt, the appellate majority compounded the injustice by reaching outside the record to find conduct by Local 530 in violation of the injunction which did not, in fact, occur. Local 530 did not exercise jurisdiction over prohibited sites. Indeed, all of the evidence is, in fact, consistent with Local 530 having been reasonably diligent and energetic in attempting to accomplish what was ordered by this prong of the injunction. *Powell v. Ward,* 643 F.2d 924, 931 (2d Cir.), *cert. denied,* 454 U.S. 832 (1981). Thus, in basing

its approval of the contempt judgment, at least in part on a finding that Local 530 exercised jurisdiction, the Second Circuit has ignored the basic tenet of contempt jurisprudence that ambiguities are to be resolved in favor of the alleged contemnor. *Ford v. Kammerer,* 450 F.2d 279, 280 (3d Cir. 1971).

To be extent that the appellate majority affirmed the contempt judgment by finding that Local 530 should have inferred the "resign or be disciplined" obligation from the phrase "cause or permit," it has allowed the "potent weapon" of judicial contempt to be wielded in a situation where the injunction is admittedly unclear. *International Longshoreman's Association, Local 291 v. Philadelphia Marine Trade Association, supra,* at 76. This result directly conflicts with applicable decisions of this Court, as well as with decisions of appellate courts, including the rule frequently cited by the Second Circuit, which holds that no party can be held in contempt for violating a court order unless the party enjoined can ascertain from the four corners of the order precisely what actions are forbidden. *See, e.g., Pasadena City Board of Education v. Spangler,* 427 U.S. 424, 439 (1976) ("[B]ecause of the rightly serious view courts have traditionally taken of violations of injunction orders, and because of the severity of punishment which may be imposed for such violation, such orders must in compliance with Rule 65 be specific and reasonably detailed".). *See also, Bowen v. American Hospital Association,* 476 U.S. 610, 625 n. 11 (1986); *Schmidt v. Lessard, supra; Granny Goose Foods, Inc. v. Brotherhood of Teamsters, supra; Town of Islip v. Eastern Airlines, Inc.,* 793 F.2d 79, 83 (2d Cir. 1986); *Alabama Nursing Home Assn. v. Harris,* 617 F.2d 385, 387-88 (5th Cir. 1980) ("requirement of specificity and reasonable detail, based in part on notions of basic fairness, ensures that individuals against whom an injunction is directed receive explicit notice of the precise conduct that is outlawed").

Thus, in this instance, unless this Court exercises its authority to reverse this contempt judgment, a labor

union will be financially crippled because its officers and advisors did not glean from the phrase "cause or permit" the duty to discipline Local 530 members who were working in a non-Local 530 capacity. Even if such a discipline obligation is consistent with the provisions of the statutory scheme governing union discipline, 29 U.S.C. § 411(a)(2), and with the First Amendment protections of freedom of association and speech, *see* Section II *infra*, it certainly is not obviously intended by the phrase "cause or permit."

This Court spared a labor union from a similar fate in the *International Longshoreman* case. In that case, the district court enforced an arbitration award by issuing an order directing compliance with the award without specifying the actual conduct being proscribed. Sometime later, the district court found certain conduct of the union to violate this order and imposed a fine of $100,000 per day of violation. This Court accepted jurisdiction over the case and struck down this award because of the union's inability to discern from the court's order "what the court intends to require and what it means to forbid." *Id.* at 76.

The contempt judgment against Local 530 is as unfair to Local 530 and its members as the judgment reversed by this Court in the *International Longshoreman's* case. Again, a union has been assessed substantial damages for conduct it could not have known to be wrong from reviewing the injunction itself. However, the judgment against Local 530 has an added twist that compounds the unfairness; Local 530 believed that it understood the injunction's decree and promptly and completely ceased collecting dues or otherwise exercising jurisdiction. As Judge Mahoney notes in his dissent, these actions exacted a substantial cost from Local 530. Thus, as opposed to the union in the *International Longshoreman's* case that complained that it had no guidance as to what conduct was proscribed by the injunction, Local 530 believed that it was in full compliance with the dictates of the injunction by withdrawing from the sites. It has now been held in

contempt for failing to infer additional responsibilities from the injunction. Under these circumstances, Justice Stewart's admonition in *International Longshoreman's* should be applied and the contempt judgment reversed:

> The most fundamental postulate of our legal order forbids the imposition of a penalty for disobeying a command that defies comprehension. *Id.* at 76.

To the extent that the district court intended to impose a "resign or be disciplined" obligation, the order defied comprehension, and this Court should accept jurisdiction over the case to make clear that the "potent power" of contempt cannot be exercised under these circumstances.

## II

**This Court should decide if a labor union can be directed to interfere with its members' rights to join a second union or to work non-union where the sole issue before the district court is the jurisdiction of the labor union itself.**

The district and appellate courts, by entering and affirming the contempt judgment in this case, have essentially held first that the injunction clearly and unambiguously directed Local 530 to discipline members who returned to the sites in non-Local 530 capacities and, second, that such a disciplinary function is consistent with the statutory scheme governing relations between unions and their members. The vagueness of the injunction as to the "resign or be disciplined" obligation and the resulting need for intervention by this Court to prevent an injustice to the members of Local 530 has been demonstrated in Section I, *infra*.

Intervention by the Supreme Court is also necessary because of the lower court's departure from the settled law of this Court and of the circuits as to the limits on a union's disciplinary power. It is well-settled that a union

may only interfere with a member's right to join a second union or to work non-union when such conduct by a member will interfere with "a union's performance of its legal or contractual obligations." 29 U.S.C. § 411(a)(2); *Airline Maintenance Lodge 702 v. Loudermilk,* 444 F.2d 719, 723-24 (5th Cir. 1971). Further, the discipline to be applied must be "reasonably related to the protection of the organization as an institution." *United Steelworkers of America, AFL-CIO v. Sadlowski,* 457 U.S. 102, 111-12 (1982). However, the mere inclusion of a command in an injunction which is beyond the court's jurisdiction does not automatically render the discipline reasonable and does not, therefore, automatically become a "legal obligation" justifying union interference. *Cf., Bowen v. American Hospital Association,* 476 U.S. at 625 n. 11 (district court's injunction to be construed as pertaining only to matters actually before it; otherwise, danger created that party subjected to punishment for contempt for violating directive which court lacked jurisdiction to issue). Rather, the reviewing court must find a legal basis for the injunction's command. No such basis was found in this case.

In this case, even assuming *arguendo* that the injunction was sufficiently clear in prescribing a "resign or be disciplined" obligation, neither the district court nor the appellate majority explained the legal basis upon which the district court could have predicated such a command. Instead, the lower courts, in an exercise in circular reasoning, found only that the obligation to expel non-resigning Local 530 members who returned to the sites as members of a second union or on a non-union basis was consistent with this principle because Local 530 was under a legal obligation to comply with an injunction.

Absent such a legal basis, the injunction, to the extent it purported to command Local 530 to discipline non-resigning members, was illegal and Local 530 cannot be held in civil contempt and subject to remedial relief for disobeying an unlawful command in an injunction. *See, United States v. United Mine Workers,* 330 U.S. 258, 295 (1947); *Brother-*

*hood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co.*, 380 F.2d 570, 583, n.36 (D.C. Cir.), *cert. denied*, 389 U.S. 970 (1967).

The illegality of an injunction commanding Local 530 to discipline non-resigning members who had joined a second union or who were working non-union derives from the limited jurisdiction of the district court. The arbitration award being enforced by the district court only affected the right of Local 530 to exercise union jurisdiction over certain sites. The award did not in any way affect the freedom of workers to join a second union or to work non-union so as to continue earning a living. Instead, the arbitration award only commanded that such work could not be performed under the aegis of Local 530. Under these circumstances, the return to these sites by Local 530 members as members of another union or on a non-union basis could not adversely affect Local 530 as an organization. Thus, the arbitration award provides no basis for disciplining Local 530 members. *United Steelworkers of America v. Sadlowski, supra.*

Thus, as a result of the arbitration decision, Local 530 did not have a legal or contractual obligation which would have justified interfering with its members' rights to join a second union or to work non-union. 29 U.S.C. § 411. Therefore, there was no legal basis for invoking the narrow exception set forth in 29 U.S.C. § 411(a)(2) to the otherwise absolute prohibition on a union's interfering with the associational freedom of its members. *See, Airline Maintenance Lodge 702 v. Loudermilk, supra; Ballas v. McKiernan*, 35 N.Y.2d 14, 358 N.Y.S.2d 695 (1974), *cert. denied*, 419 U.S. 1034, 95 S.Ct. 517, 72 L.Ed.2d 309 (1974). Further, under these circumstances, any judicial direction that Local 530 actively interfere with its members would have contravened the Freedom of Association clause of the First Amendment to the United States Constitution which clearly protects unions and their members. *Allee v. Medrano*, 416 U.S. 802, 819 n. 13 (1974); *Thomas v. Collins*, 323 U.S. 516, 531-33 (1945); *AFSCME v. Woodward*, 406

F.2d 137, 139 (8th Cir. 1969); *cf., St. German of Alaska E. Orthodox Church v. United States,* 840 F.2d 1087, 1094 (2d Cir. 1988) (government action which may operate to restrict the freedom of association is subject to exacting scrutiny).

Instead, of addressing these issues, the appellate majority only found that since "complying with an injunction is a legal obligation of a union, it would be appropriate for Local 530 to discipline members who violated the injunction." However, nowhere does the appellate majority explain the legal basis for an injunction that would restrict the freedom of Local 530 members to join a second union or to work non-union. Thus, the jurisdiction of the district court in issuing its injunction was similarly limited to restraining Local 530's exercise of union jurisdiction and it could not issue an injunction restricting the freedom of Local 530's members to act in non-Local 530 capacities.[5]

Absent intervention by this Court, Local 530 will be subject to a substantial damage judgment for failing to engage in conduct which would have directly violated the statutory and constitutional scheme governing relations between unions and their members. Such a result establishes an untenable precedent, and this Court should act to clarify the limitations on the exception set out in 29 U.S.C. § 411(a)(2).

## Summary

This case raises important federal issues concerning the extent of the judicial contempt power and the ability of a federal judge to direct a labor union to interfere with the

[5] At a minimum, this statutory scheme makes it illogical to assume that Local 530 would infer a "resign or be disciplined" obligation from the language of this injunction. Given that unions are traditionally prohibited from interfering with the freedom of its members to join other unions, and given the failure of the injunction to address the issue of whether members of Local 530 could join another union, Local 530 logically interpreted the injunction as requiring it to withdraw from the sites as a union without affecting the freedom of its members. Under these circumstances, the judgment of contempt should be reversed.

freedom of its members. The decision of the appellate court is in clear conflict with prior decisions of this Court as to when a judgment of civil contempt can be entered. Thus, this case presents a clear opportunity for this Court to reiterate and to clarify the standard as to the requisite specificity of an injunction before a litigant, including a labor union, can be subjected to the draconian financial penalties of civil contempt. It also offers this Court an opportunity to clarify the limitation on a district court's ability to interfere with the freedoms of union members to join multiple unions and/or to work non-union. Absent action by this Court, these same members of Local 530 will be forced to pay almost $700,000 in penalties because their officers did not infer from the phrase "cause or permit" in the injunction that the district court intended these officers to discipline non-resigning members.

## Conclusion

**For all of these reasons, this Court should issue a writ of certiorari to the Court of Appeals for the Second Circuit to review the questions presented.**

Dated: New York, New York
January 16, 1990

Respectfully submitted,

BRIAN E. MAAS
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## Appendix A

[CORRECTED OPINION]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Nos. 1216, 1217, 1218, 1219,
1220, 1221, 1222—August Term, 1989

(Argued: September 11, 1989

Decided: October 23, 1989)

Docket Nos. 89-7127, 89-7129, 89-7131, 89-7133,
89-7135, 89-7137, 89-7161

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DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK, LOCAL 1974 OF I.B.P.A.T. AFL-CIO, on its own behalf and on behalf of all persons who are or at any time since March 1, 1978 have been members thereof, and JOHN ALFARONE, as President, and DANIEL JONES, as Treasurer of Drywall Tapers and Pointers of Greater New York Local 1974 of I.B.P.A.T., AFL-CIO,

*Plaintiffs-Appellees,*
*Cross-Appellants,*

—v.—

LOCAL 530 OF OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, and MICHAEL CANUSO as President and LOUIS D. MOSCATIELLO as Secretary-Treasurer of LOCAL 530 of Operative Plasterers and Cement Masons International Association,

*Defendants,*

LOCAL 530 OF OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION and LOUIS D. MOSCATIELLO,

*Defendants-Appellants, Cross-Appellees,*

B-DRYWALL FINISHERS and JOSEPH IANNO, WOODWORKS CONSTRUCTION COMPANY and HAROLD HEUSTEIN, non-party witnesses herein, non-party ROBERT E. GOLDMAN and IMPROVED DRYWALL, INC., and ROBERT VERGARA,

*Appellants, Cross-Appellees.*

---

Before:

CARDAMONE, MAHONEY, *Circuit Judges*, and POLLACK, *District Judge.* *

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Appeals from amended judgments in favor of plaintiffs dated January 27, 1989, adjudging defendants in civil contempt for violating a permanent injunction and awarding monetary damages; and from incidental rulings and orders made during the litigation entered by Eugene H. Nickerson, *Judge*, in the United States District Court for the Eastern District of New York.

AFFIRMED as to Local 530.

REVERSED as to the remaining defendants and as to them remanded to the District Court for further proceedings

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* Honorable Milton Pollack, Senior United States District Judge for the Southern District of New York, sitting by designation.

consistent with Civil Rule 43(a) of the Rules of the United States District Courts for the Southern and Eastern Districts.

Judge Mahoney affirms in part and dissents in part in a separate opinion.

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RICHARD GUAY, New York, N.Y. (Montclare & Guay, New York, N.Y.), *for Defendant-Appellant, Cross-Appellee Louis Moscatiello.*

ROBERT M. ZISKIN, Commack, N.Y., *for Appellants, Cross-Appellee B-Drywall Finishers and Joseph Ianno.*

ROBERT I. LESSER, New York, N.Y. (McDonough, Marcus, Cohn & Tretter, P.C., New York, N.Y.), *for Appellants, Cross-Appellee Woodworks Construction Company and Harold Heustein.*

BRIAN E. MAAS, New York, N.Y. (Rosenblatt, Maas, Wirfel & Stolz, P.C., New York, N.Y.), *for Defendant, Cross-Appellee Local 530 Operative Plasterers and Cement Masons International Association.*

MARK A. JACOBY, New York, N.Y. (Weil, Gotshal and Manges, New York, N.Y.), *for Appellants, Cross-Appellee Improved Drywall and Robert Vergara.*

HARVEY STONE, New York, N.Y. (Schlam, Stone and Dolan, New York, N.Y.), *for Appellant, Cross-Appellee Robert E. Goldman.*

BURTON J. HALL, New York, N.Y. (Hall & Sloan, New York, N.Y.), *for Plaintiffs-Appellees, Cross-Appellants Drywall Tapers, et al.*

Milton Pollack, Senior District Judge:

*Statement*

Nine contemnors—defendant Local 530 and eight non-parties—appeal from a judgment finding them in civil contempt for willful violation of the Court's injunctive orders, and awarding damages and costs to plaintiffs. The contemnors, who are appellants here, are Local 530 itself, its President/Secretary-Treasurer, Louis Moscatiello, its sometime attorney Robert E. Goldman, Esq., and three employers: Improved Drywall and its owner, Robert Vergara; "B-Drywall" and its owner (a sometimes employee of Improved), Joseph Ianno; and Woodworks Construction and its owner, Harold Heustein.

*Background*

The contempt proceedings adjudicated below on these appeals are part of an action between Local 1974, a member union of the International Brotherhood of Painters and Affiliated Trades, and Local 530, a member union of the Operative Plasterers and Cement Masons Interna-

tional. The underlying action is itself one part of an historical rivalry between these two construction trades over the representation of workers engaged in the preparation of drywall for painting and wallpapering. During the 1970's, this rivalry was extended to a dispute as to union jurisdiction over a newly developed technique for preparing drywall whereby the entire drywall surface was skim-coated with a diluted solution of the taping and pointing compound. In 1977, the Building Trades Department of the AFL-CIO appointed a National Hearings Panel to determine the allocation of jurisdiction between the two trades. By decision effective March 31, 1978, binding on both trades, the National Hearings Panel awarded jurisdiction as follows:

> (1) All pointing and taping, regardless of the material used, is painters' work, provided the drywall surfaces are not to receive plaster, acoustical, or imitation acoustical finishes.
>
> (2) Pointing and taping, regardless of material used, of drywall surfaces which are to receive plaster, acoustical or imitation acoustical finishes shall be the work of plasterers.
>
> (3) The surface produced by the application of the same plaster pointing material as used in the pointing and taping of the joints to the entire drywall surface for the purpose of producing a uniform surface compatible with the pointed and taped joints shall be considered a plaster finish, and the pointing and taping in connection therewith shall be the work of plasterers.

*See Drywall Tapers & Pointers v. Operative Plasterers' and Cement Masons' Int'l Ass'n.*, 601 F.2d 675 (2d Cir. 1979) *cert. denied*, 444 U.S. 1073 (1980).

In a local arbitration proceeding before the Building Trades Employers Association, (the body to which resort is required in the first instance), charging that Local 530 was performing work that belonged to Local 1974, an award on June 24, 1980, found that the work belonged to Local 1974 and not to Local 530:

> since the material applied is not applied for the purpose of producing a uniform surface compatible with the pointed and taped joints.

However, Local 530 continued to perform work in violation of the arbitration award. Local 1974 therefore brought this suit to enforce that arbitration decision.

Local 1974 commenced the underlying lawsuit in 1981 seeking a permanent injunction barring Local 530 from violating contracts and arbitration awards by causing its members to perform drywall taping and pointing work, in New York City, that was and had been the work jurisdiction of Local 1974 under such contracts and arbitration awards. After three unsuccessful attempts at obtaining a preliminary injunction, Local 1974 then brought another motion for a preliminary injunction restraining Local 530 from exercising jurisdiction over any sites in New York. The District Court had refused relief pending a reference of the jurisdictional complaints to the Building and Construction Trades Council of Greater New York ("BCTC"), the industry body entrusted with responsibility for resolving such complaints. BCTC made an award in favor of Local 1974.

On January 9, 1984, the District Court issued a preliminary injunction limited to those sites specifically covered by the award. The preliminary injunction ordered:

> that defendant Local 530 . . . its officers, agents, servants, employees and attorneys, and all persons in active concert or participation with any of them who receive actual notice of this Order . . . be and they hereby are enjoined and restrained from asserting jurisdiction over, and from causing or permitting members of such labor union to perform work at, any of the following job sites . . . . [list of job sites omitted]

The District Court then held an evidentiary hearing on Local 1974's motion for a permanent injunction, and on February 2, 1984, issued a permanent injunction, again limited to those sites covered by the BCTC award and otherwise identical to the language of the preliminary injunction.

Local 530 appealed from the permanent injunctive order on February 9, 1984. By order, without formal opinion, this Court unanimously affirmed the permanent injunction on April 13, 1984.

When the preliminary injunction was entered, drywall work was being performed at 29 affected sites pursuant to collective bargaining agreements between contractors and Local 530. Local 530 then sent a letter to its members and to contractors notifying them of the injunction, advising them that Local 530 would no longer exercise jurisdiction at the sites, and instructing its members to comply with the injunction.

At the time of the injunction, Local 530 had approximately 300 members working at various sites in New York, including the 32 covered by the preliminary injunction. After the permanent injunction was entered, Local 530 contractors continued to assign Local 530 members to

worksites and continued to remit dues check-offs and fringe benefit payments to the union's welfare fund. Local 530 continued to collect dues check-offs or fringe benefits payments relating to drywall work at the prohibited sites and acted constructively as a representative of any workers at those sites.

*The Contempt Proceedings*

a) *The First Contempt Motion*:

On February 14, 1984, Local 1974 moved by order to show cause to have Local 530 and four contractors held in contempt for violating the injunctions. Local 530's President, Mr. Moscatiello, was not named as a party to this contempt proceeding. This motion, based on observations made by Local 1974 officials at prohibited sites, alleged that workers known to have been members of Local 530 had been observed working at three of the prohibited sites and that Local 530 was, therefore, still asserting jurisdiction over the sites.

It was represented to the court on the motion that the men supposedly working under the aegis of Local 530 had decided not to remain unemployed and had gone to other unions and were working on those jobs as members of other unions but that Local 530 had nothing to do with past participation in any way whatsoever. The lawyer for Local 530 opened by advising the court that, as to the men observed by Local 1974, ". . . these men are not working as 530 members."

On those representations, plaintiffs were advised that the Court would not find Local 530 or the employers in contempt on a record that failed to show that the employees had remained members of Local 530. The Court observed that "maybe, [defendants] are playing games

here, I don't know whether they are, and if they are, they are going to find it wasn't profitable for them to play games. . . ."

The contempt motion was denied and Local 1974 was directed to conduct further discovery.

b) *The June 1985 Contempt Motion*:

By motion dated June 24, 1985, by which time all of the prohibited jobs were completed, Local 1974 renewed its contempt motion against Local 530 alleging that the latter had retained jurisdiction over the sites through the receipt of payments on behalf of its members. Specifically, it was alleged that Local 530 asserted jurisdiction over the drywall taping work performed on the prohibited job sites; that the employers involved had participated in such violation and had continued to check-off the work dues of those Local 530 members and to pay the work dues over to Local 530; and consequently, that Local 530 had continued to assert jurisdiction over the prohibited job sites.

The evidence for these assertions was obtained through discovery. Work records and remittance forms were obtained both from Local 530 and from contractors, while depositions of both workers and contractors were held. In support of the allegation that Local 530 had continued to assert jurisdiction over the prohibited job sites, Local 1974 alleged that the former had continued to demand payment of such checked-off dues and payment of contribution to its funds.

Appellee's motion alleged acts of contempt as to 16 of the 32 sites and subsequently limited its complaint to the 10 sites for which two particular contractors had been responsible for the drywall work. The matter was then referred to a Magistrate in respect of discovery disputes

for report and recommendation. After hearings, at which the only representative parties on whose behalf evidence was presented were Local 1974 and Local 530, the Magistrate reported to the court with the recommendation that Local 530 and various non-parties to the contempt proceeding be found to have willfully violated the injunction because of Local 530's failure to discipline the non-resigning members who had worked at prohibited sites and recommended the imposition of damages. The District Court agreed with the Magistrate's recommendations, except in the matter of the scope of the damages which were revised, holding that the injunction clearly and unambiguously imposed an obligation on Local 530 members to resign from Local 530 before returning to prohibited sites in a non-Local 530 capacity, and further, clearly and unambiguously, establishing an obligation for Local 530 to seek out such non-resigning members and discipline them for having returned to work in a non-Local 530 capacity. The Judge also agreed that the contempt had been willful and upheld the recommendation that the alleged contemnors pay attorneys' fees. Included in the Judge's decision were the contemnors other than Local 530 who were also cast in damages. These others will be dealt with separately later in this opinion.

On its appeal, Local 530 contends that the injunction was not sufficiently specific in terms and failed to describe in reasonable detail the act or acts sought to be restrained. It is contended that the union did not receive the explicit notice of precisely what conduct was outlawed. For example, the injunction did not recite that it required Local 530 members to resign if they wished to return to work at a prohibited site in some capacity other than the Local 530 member. Nor, they say, was notice given to them that they could be held in contempt if they did not affirmatively

question the identity and union membership of workers at prohibited sites. Local 530 states that the injunction on its face only barred the union from actively asserting jurisdiction over the sites and from causing or permitting members of Local 530 from working at the sites; and policing both its members and the prohibited sites to determine if members of Local 530 had returned to the sites in any capacity was not an obligation imposed on the union by the injunction. The District Court held otherwise. We sustain that finding since the conduct and the explanations thereof were properly seen by the District Court as mere subterfuge and unworthy explanations after the Court was misled as to the factual situation on the first contempt proceeding.

*Standards*

1. Violation of an Injunction

A court may hold a party in civil contempt only if there is a clear and unambiguous order, noncompliance is proved clearly and convincingly, and "the defendant has not been reasonably diligent and energetic in attempting to accomplish what was ordered." *Powell v. Ward*, 643 F.2d 924, 931 (2d Cir.), *cert. denied*, 454 U.S. 832 (1981) (citing cases).

2. Due Process

Due process requires that before being held in contempt, a party must have notice that it is a defendant in a contempt hearing. Fed. R. Crim. P. 42(b); *Remington Rand Corp.-Del. v. Business Sys., Inc.*, 830 F.2d 1256, 1258 (3d Cir. 1987) (applying Rule 42(b) to civil contempt cases); *Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106, 109 (2d Cir. 1987) (same).

But where the contempt citation will not result in a fine or imprisonment, formal service is not required. So long as the defendant had actual notice of the contempt proceedings, there is no denial of due process. *United States v. Handler*, 476 F.2d 709, 713 (2d Cir. 1973); see also *In re Grand Jury Witness [Arambulo]*, 835 F.2d 437, 441 (2d Cir. 1987), *cert. denied sub nom. Arambulo v. United States*, ____ U.S. ____, 108 S. Ct. 1602, 99 L.Ed. 2d 917 (1988) (". . . those constitutional due process protections afforded a contemnor facing prison are not perceived to be necessary to the same degree to a civil contemnor not facing that prospect.")

3. Local Rule 43(a)

In addition to the normal due process requirements, the lower court has a salutary local rule which states that:

> A proceeding to adjudicate a person in civil contempt of court . . . shall be commenced by the service of a notice of motion or order to show cause.

Civil Rule 43(a), Rules for the United States District Courts for the Southern and Eastern Districts. This rule is more restrictive in that it requires actual notice by service upon a party's attorney or in the manner provided for by the Federal Rules of Civil Procedure. The Rule further requires that:

> The affidavit upon which such notice of motion or order to show cause is based shall set out with particularity the misconduct complained of, the claim, if any, for damages occasioned thereby, and such evidence as to the amount of damages as may be available to the moving party. *Id.*

4. Standard of review

The District Court's findings of fact may only be overturned on appeal if they are "clearly erroneous." Fed. R. Civ. P. 52(a); *Ottaviani v. S.U.N.Y.*, 875 F.2d 365, 375 (2d Cir. 1989) (court may only reject findings by the trial court when left with the "definite and firm conviction that a mistake has been committed." (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948))).

Where a magistrate has been appointed to conduct an evidentiary hearing, the district court reviews the Report and Recommendation under the same clearly erroneous standard. Fed. R. Civ. P. 53(e)(2); *Wooldridge v. Marlene Indus. Corp.*, 875 F.2d 540, 544 (6th Cir. 1989); *Brown v. Wesley's Quaker Maid, Inc.*, 771 F.2d 952, 954 (6th Cir. 1985), *cert. denied*, 479 U.S. 830 (1986). Then, "[t]he findings of [the magistrate], to the extent that the court adopts them, shall be considered as the findings of the court." Fed. R. Civ. P. 52(a).

*Violation of the Injunction*

1. Local 530

Local 530 may only be held in contempt if it violated a clear and unambiguous order that left no doubt in the minds of those to whom it was addressed. *Hess v. New Jersey Transit Rail Operations, Inc.*, 846 F.2d 114, 116 (2d Cir. 1988). In determining specificity, the party enjoined must be able to ascertain from the four corners of the order precisely what acts are forbidden. *Sanders v. Air Line Pilots Ass'n, Int'l*, 473 F.2d 244, at 247 (2d Cir. 1972).

Local 530's arguments that the injunction was ambiguous as to its requirements, including the requirement to

pull all of its members off of the prohibited job sites and to discipline those members who did work at the prohibited jobsites, are unavailing. Local 530 itself based a motion for reargument of the preliminary injunction on the grounds that the injunction would prevent Local 530 members from performing "any work" at the prohibited jobsites. There was also a conscious conspiracy of silence in the union concerning the workers who stayed on the prohibited jobsites so that they would not have to be pulled off. The officers and the members working on the sites did not mention it to Moscatiello, the President, so that he would not have to tell them to stop. Tongue in cheek, "they did not tell him because he did not want to know."

The lack of ambiguity is also evidenced by the fact that one of the contractors, Woodworks Construction, sent a letter to the court complaining that the injunction would cause Woodworks great hardship since it would not be allowed to hire Local 530 laborers.

The proof of noncompliance is clear and convincing. At the same time as Local 530 was making the argument that the injunction would prevent all work by Local 530 members, Local 530 officers and a coterie of the members were working on the prohibited jobsites, obviously in conscious violation of this interpretation of the preliminary injunction. After the issuance of the permanent injunction, these officers and members nonetheless continued to work on the prohibited jobsites.

The fact that Local 530 officers were working on the jobsites makes clear that Local 530 was not diligent and energetic in attempting to accomplish what was ordered. This also establishes Local 530's "knowing tolerance" of contemptuous actions by its members. *See U.M.W.A. v.*

*Gibbs*, 383 U.S. 715, 739 (1966); *NLRB v. Teamsters, Chauffers, Helpers & Taxicab Drivers, Local 327*, 592 F.2d 921, 928 (6th Cir. 1979).

Local 530 also contends that a reading of the injunction which would force it to expel or to discipline members would violate the federal labor laws.

The labor "Bill of Rights," 29 U.S.C. § 411, protects union members from being disciplined for exercising their right to speak or to assemble or for joining rival unions. However, § 411(a)(2) provides:

> That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member . . . to . . . refrain[ ] from conduct that would interfere with [the organization's] performance of its legal or contractual obligations.

Certainly, complying with an injunction is a legal obligation of a union. So it would be appropriate for Local 530 to discipline members who, as a subterfuge, also colorably joined other unions or who worked on a non-union basis at the jobsites. Cf. *Lewis v. AFSCME*, 407 F.2d 1185 (3d Cir.) (the court upholds the expulsion of a member who interfered with the union's obligations under a collective bargaining agreement), *cert. denied*, 396 U.S. 866 (1969).

Section 7 of the LMRA, 29 U.S.C. § 158, does not support Local 530's contention that it was prohibited from asking employers to fire Local 530 members who had joined other unions. First, had Local 530 expelled the "rogue" members, this provision would not come into play. It was only because Local 530 did not prevent its members from working on the jobsites that the question of dual union membership arose. Second, the basis for any

request to fire would have been membership in Local 530, not membership in another union.

Even if Local 530 could reasonably believe (which is implausible) that the injunction only prevented an assertion by Local 530 of jurisdiction at the jobsites, the union unequivocally and consciously violated the injunction:

(a) Some Local 530 members continued as members in good standing of Local 530, i.e. they were paying dues to Local 530 to insure their union benefits and perquisites, while working at the prohibited sites;

(b) Local 530 collected the checkoff dues and fringe benefit payments directly from the contractors for the Local 530 union members working at the prohibited jobsites;

(c) After the injunction was issued, Local 530 collected 945 hours worth of dues checkoffs and fringe benefits directly from one of the contractors, Woodworks. (Local 530 claims that this was due to Woodworks accounting errors).

Local 530 cannot claim that its due process rights were violated. The union was named in each of the three motions submitted by Local 1974. In his opening remarks, the Magistrate stated, "Judge Nickerson has asked me as one of the magistrates of this Court to undertake a hearing on the plaintiff's motion in this particular case to hold Local 530 in contempt of an Order . . . ."

In addition, Local 530 received a copy of the Report and Recommendation, objected to it and asked for its rejection.

Clearly, Local 530 had actual notice of the contempt proceedings. It also had formal notice by service upon its attorney sufficient for Local Rule 43.

2. The Other Contemnors

The district court's order enjoined Local 530 and "all persons in active concert or participation with any of them who receive[d] actual notice of th[e] Order by personal service or otherwise . . . ." *See* Fed. R. Civ. P. 65(d).

Local 530 sent a letter to all of its members and to each of the contractors with whom it had a collective bargaining agreement informing them of the injunction and requesting compliance. Despite this letter, Woodworks Construction, Improved Drywall, B-Drywall Finishers, and their respective principals, hired Local 530 officers and members to work at the prohibited jobsites.

B-Drywall was only set up after the injunction was issued. It was set up by Joseph Ianno, a Local 530 member, to take over some of Improved Drywall's contracts. To facilitate the scam, B-Drywall signed a collective bargaining agreement with a garage attendants union which Local 530 members then joined.[2]

Woodworks manifested its understanding of the injunction in a letter to the court, but then hired Local 530 members and remitted checkoff dues and fringe benefit payments to the union.

Robert Goldman was Local 530's trial counsel at the first contempt hearing. In the course of the hearing, he falsely represented to the court that:

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2 At the request of its international union, the garage attendants union, Teamsters Local 272, eventually withdrew from representing any workers at the prohibited jobsites.

> many of these men have gone to other unions and are working on those jobs as members of other unions . . . 530 has nothing to do with past participation with it in any way whatsoever . . . we have no relationship to them or anything whatsoever . . . 1974 must be fully aware of these facts that these men are not working as 530 members.

Louis Moscatiello, the president of Local 530, later testified that he tried to correct Mr. Goldman on these issues but that Mr. Goldman told him to be quiet.

The contemnors other than Local 530 considered in the second contempt motion challege the sufficiency, on due process grounds, of the notice of contempt proceedings against them. The record shows that:

> (a) each contemnor was aware that Judge Nickerson had designated a magistrate to handle discovery matters, to conduct an evidentiary hearing and to submit a report;
>
> (b) each contemnor received the magistrate's report promptly upon its issuance;
>
> (c) each contemnor submitted objections to the Report and Recommendation of the magistrate;
>
> (d) each of the employer contemnors moved for rejection of the Report and Recommendation, served motions and affidavits and Memoranda of Law with respect thereto;
>
> (e) Local 1974 brought its third contempt motion naming each contemnor and asking that each be adjudged in contempt; the Report and Recommendations was attached to the motion papers; each employer contemnor submitted an affidavit and

memorandum of law in opposition, and Moscatiello and Goldman submitted letters in opposition;

(f) none of the contemnors, in their objections, or in their motions to reject or in their opposition to Local 1974's third contempt motion asked for a new evidentiary hearing or for a reopening of the evidentiary hearing;

(g) Judge Nickerson approved the Report and Recommendation as modified on December 12, 1986 and by Memorandum and Order of December 15, 1986, he denied Local 1974's third contempt motion "[i]n light of the December 12, 1986 Memorandum and Order";

(h) each contemnor moved for reargument, but this time Goldman asked for an evidentiary hearing which was denied.

The contractors had actual, if not formal, notice of the proceedings before the magistrate and the Judge, of their nature and substance, and of the place and date where they would be heard. Mr. Goldman had actual notice of the proceedings before the Judge.

Louis Moscatiello also received constructive notice of the contempt hearing through his positions as President and Secretary-Treasurer of Local 530. But the notice to Local 530 does not rise to level of formal notice for Louis Moscatiello. *Dole Fresh Fruit Co.*, 821 F.2d at 110 (notice to the corporation that it is a defendant in a contempt hearing is not sufficient formal notice to its officers); *see also Remington Rand Corp.*, 830 F.2d at 1259 (notice to corporation was not sufficient notice to bankruptcy trustee).

However, constructive notice does not satisfy Local Rule 43(a). Not one of the contemnors, other than Local 530, received the notice to which they were entitled under Rule 43(a). In the absence thereof, an order of contempt against them as non-parties to the proceedings was inappropriate.

*Damages*

Appellants also challenge the compensatory damages awarded by the district court.

In the Magistrate's original Report and Recommendation, damages were calculated on the theory that if not for Local 530's violation of the injunction, Local 1974 members would have received the employment and should be compensated for all man hours worked on the prohibited sites. The district court rejected this theory and ordered that individual 1974 members would be compensated for the man hours they were unemployed during the period of the contemptuous behavior. Local 1974 was also to be compensated for its lost dues and fringe benefit payments. A ceiling was set based on the number of man hours worked by Local 530 officers and members at the prohibited jobsites.

After extensive discovery had taken place, the Magistrate conducted a careful review of each individual claim and awarded compensatory damages. The Magistrate then adjusted the damages downwards to conform to the ceiling set by the district court.

After receiving objections from both sides, the district judge conducted a *de novo* review and approved the Magistrate's Report and Recommendation with some modifications.

In light of the record and the careful review conducted by the Magistrate and the Judge, we are unable to say that their findings are clearly erroneous.

*Conclusion*

The judgment of contempt is upheld as to Local 530. The damages award is also upheld.

The judgment of contempt as to Louis Moscatiello, Robert Goldman, B-Drywall Finishers, Joseph Ianno, Woodworks Construction, Harold Heustein, Improved Drywall, and Robert Vergara is vacated and as to them the matter is remanded to the district court for proceedings in accordance with this opinion and Local Rule 43(a).

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MAHONEY, *Circuit Judge*, concurring in part and dissenting in part:

I concur in the result as to defendant-appellant Louis D. Moscatiello and appellants Robert E. Goldman, B-Drywall Finishers, Joseph Ianno, Woodworks Construction Company, Harold Heustein, Improved Drywall, Inc. and Robert Vergara. It is clear that all persons charged with contempt are entitled to notice that they are defendants in a contempt proceeding, as well as adequate time to prepare a defense, except in the limited circumstances envisioned by Fed.R.Crim.P. 42(a) where instant action is necessary to protect the judicial institution itself. *See Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106, 110 (2d Cir. 1987), and cases there cited. Since no such notice was provided here, reversal as to the contemnors other than Local 530 would plainly be required, in my view,

even in the absence of Rule 43(a) of the Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York, upon which the majority relies.

I am unable to concur, however, in the majority's decision to uphold the finding of contempt against Local 530. The injunction under review prohibited Local 530 from "asserting jurisdiction over, and from causing or permitting [its] members to perform work at," specified jobsites. In response to the injunction, Local 530 terminated its supervisory activities at the affected jobsites, sent letters to its members advising them of the injunction and asking that it be obeyed, and notified the relevant contractors.

In the affidavit supporting its contempt motion, Local 1974 alleged that Local 530 "not only caused and permitted its members to work on [affected] jobsites but, in addition, asserted jurisdiction" over those sites. The Report and Recommendation of Magistrate Caden, however, stated as Local 1974's sole contention concerning Local 530 that "Local 530 . . . caused and permitted members of Local 530 to perform work on certain prohibited jobsites," and aside from two peripheral footnotes, the Report and Recommendation addressed only that issue. In adopting the magistrate's recommendations, furthermore, the district court relied upon and addressed only the "cause or permit" language as the basis of Local 530's violation. The court found Local 530 in contempt for failing to (1) ascertain that certain of its members continued to work at the prohibited jobsites, and (2) discipline or expel those members.

This appeal, therefore, presents us with the question whether the "cause or permit" language of the injunction under review is sufficiently clear and precise as a matter of law to serve as the basis for a contempt adjudication on

the facts here presented. For the reasons stated below, I part company with the majority's answer to this question. As a prelude, however, I am moved to address the majority's additional assertion that Local 530 is in any event guilty of "asserting jurisdiction" over the affected jobsites, thereby rendering the contempt ruling sustainable on that alternative theory.

As indicated above, that theory does not underlie the determination we are now reviewing. To be sure, we may consider any argument or theory finding support in the record that serves to sustain a correct district court decision. *See, e.g. Helvering v. Gowran*, 302 U.S. 238, 245 (1937); *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 887 (2d Cir. 1987). We may even raise a "decisive theory" *sua sponte*. *See Arlinghaus v. Ritenour*, 622 F.2d 629, 638 (2d Cir.) (citing *Cold Metal Process Co. v. McLouth Steel Corp.*, 126 F.2d 185, 189 (6th Cir. 1942) (dictum)), *cert. denied*, 449 U.S. 1013 (1980). As Judge Friendly said in *Arlinghaus*, however:

> [A]ppellate courts must tread cautiously over terrain that the parties have failed to explore on appeal. Any issue injected into the appeal by the court itself must have been adequately presented below, and the parties must have had a full opportunity to develop the relevant facts. In addition, the appellate court should have the benefit of thorough briefing before considering a decisive issue or rationale.

622 F.2d at 638 (citation omitted).

It seems to me that the considerations outlined by Judge Friendly counsel us to refrain from adopting the "asserting jurisdiction" theory in the present circumstances. First, we obviously lack the guidance of briefing or argu-

ment with respect to it. Second, the points advanced by the majority in support of the theory do not present a strong argument for its adoption. These points are as follows:

> (a) Some Local 530 members continued as members in good standing of Local 530, i.e. they were paying dues to Local 530 to insure their union benefits and perquisites, while working at the prohibited sites;
>
> (b) Local 530 collected the checkoff dues and fringe benefit payments directly from the contractors for the Local 530 union members working at the prohibited jobsites;
>
> (c) After the injunction was issued, Local 530 collected 945 hours worth of dues checkoffs and fringe benefits [payments] directly from one of the contractors, Woodworks. (Local 530 claims that this was due to Woodworks accounting errors).

Point (a), I believe, speaks to the "cause or permit" issue, not to the question whether jurisdiction was asserted by the union. Point (b), as far as I can tell, is referring to the same situation as point (c), but in much more general terms. The record before us does not warrant any such generalization. Point (c) itself is certainly a correct statement, but whether those 945 hours—out of a total of 110,159.4—justify a finding of contempt on the "asserting jurisdiction" theory or, on the contrary, illustrate substantial compliance with the injunctive order should not, I suggest, be determined by us *sua sponte* at this stage, especially in the context of (1) an assertion by Local 530 that the collection resulted from an accounting error by a third party, and (2) the absence of any consideration of, or findings of fact concerning, this issue by the magistrate or the district court.

I now turn to the heart of my disagreement with the majority. While I accept the premise that it was within the district court's authority to require Local 530 to take the dual steps of policing the jobsites and disciplining errant members found thereat, I do not share the view that these steps were actually required by the injunction under review with the clarity and precision necessary to sustain the finding of contempt and resulting $542,863.37 damage award.

A finding of contempt for violating an injunction is proper only if (1) the order is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the defendant has not been reasonably diligent and energetic in attempting to accomplish what was ordered. *Powell v. Ward*, 643 F.2d 924, 931 (2d Cir.) (per curiam), *cert. denied*, 454 U.S. 832 (1981). *See, e.g., Hess v. New Jersey Transit Rail Operations, Inc.*, 846 F.2d 114, 116 (2d Cir. 1988) ("No one may be held in contempt for violating a court order unless the order is clear and specific and leaves no uncertainty in the minds of those to whom it is addressed.") (citing *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967), and *Powell v. Ward*, 643 F.2d at 931); *Sanders v. Air Line Pilots Ass'n, Int'l*, 473 F.2d 244, 247 (2d Cir. 1972) (normal standard of specificity is that party enjoined must be able to ascertain from four corners of order precisely what acts are forbidden). Furthermore, "[t]he longstanding, salutary rule in contempt cases is that ambiguities and omissions in orders redound to the benefit of the person charged with contempt." *Ford v. Kammerer*, 450 F.2d 279, 280 (3d Cir. 1971).

The first element of the *Powell* rule, requiring that an injunction be "clear and unambiguous," builds upon the requirements of Fed.R.Civ.P. 65(d) that an injunction

"be specific in terms" and "shall describe in reasonable detail . . . the act or acts sought to be restrained." In my judgment, this element has not been satisfied.

Local 530 clearly took actions calculated to comply with the plainly stated command of the district court, *i.e.*, to withdraw from the affected jobsites. While it is true that the union had originally opposed the injunction on the ground that it would enjoin members of Local 530 from performing "any work" at the jobsites, this does not establish that Local 530 understood the injunction to forbid its members from working on those jobsites in a non-Local 530 capacity, much less as requiring Local 530 to police those sites and take disciplinary action against offending workers. It is not clear, furthermore, that such actions were contemplated by the spirit and purpose of the injunction, the primary objective of which was to ensure removal of Local 530 from jurisdictional authority over the affected sites. This is far from a toothless remedy; indeed, Local 530 experienced immediate and obvious financial reverses as a result of this removal.

"The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid." *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967). In this case, Local 530 has been found guilty of failing to take steps which the district court injunction did not require with precision and clarity. I therefore respectfully dissent from the decision to uphold the finding of contempt against Local 530.

## Appendix B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 11th day of December one thousand nine hundred and eighty-

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DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK LOCAL 1974, ET. AL.,

*Plaintiff-Appellees-Cross-Appellants,*

-v- 89-7127

LOCAL 530 OF OPERATIVE PLASTERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, ET. AL.

*Defendant-Appellants-Cross Appellees.*

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Petitions for rehearing containing suggestions that the action be heard in banc having been filed herein by counsel for the non-party appellant, Robert E. Goldman and by counsel for the defendant-appellants-cross-appellees, Local 530 of Operative Plasterers and Cement Masons International Association.

Upon consideration by the panel that heard the appeal, it is

Ordered that the said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ *Elaine B. Goldsmith*

ELAINE B. GOLDSMITH
Clerk

**APPENDIX C**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

| | |
|---|---|
| DRYWELL TAPERS OF GREATER NEW YORK LOCAL 1974 of I.B.P.A.T., AFL-CIO, on its own behalf and on behalf of all persons who are or at any time since March 1, 1978 have been members thereof, and JOHN ALFARONE, as President, and DANIEL JONES as Treasurer of Drywall Tapers and Pointers of Greater New York, Local 1974 of I.B.P.A.T., AFL-CIO, | 81 C 0337 |
| Plaintiffs, | MEMORANDUM AND ORDER |
| -against- | |
| Local 530 of OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, AND LOUIS D. MOSCATIELLO, as President of Local 530 of Operative Plasterers and Cement Masons International Association, | |
| Defendants. | |

HALL & SLOAN
(Burton H. Hall, Esq.,
of counsel)
New York, New York
for plaintiffs

ROSENBLATT & MAAS, P.C.
(Brian E. Maas, Esq.,
of counsel)
for defendant Local 530

MONTCLARE & GUAY
(Richard Guay, Esq.,
of counsel)
New York, New York
for Louis Moscatiello

SCHLAM STONE & DOLAN
(Harvey M. Stone, Esq.,
of counsel)
New York, New York
for Robert E. Goldman, Esq.

WEIL, GOTSHAL & MANGES
(Mark A. Jacoby, Esq. and
Joel C. Schochet, Esq.
of counsel)
New York, New York
for Improved Drywell, Inc.
and Robert Vergera

ROBERT M. ZISKIN, ESQ.
Commack, New York
for B-Drywell Finishers
and Joseph Ianno

McDONOUGH MARUS COHN &
TRETTER, P.C.
(Robert I. Lesser, Esq.,
of Counsel)
New York, New York
for Woodworks Construction
Company and Harold Heustein

MICHAEL KEATING, ESQ.
White Plains, New York
for Primo Construction Co.
and Carmine Pistone

NICKERSON, District Judge

Defendants and non-parties have filed objections and appealed from Magistrate Caden's report and recommendation that they be held in civil contempt of this court's orders dated January 3, 1984 and February 2, 1984. After plaintiffs filed an order to show cause returnable on February 15, 1984 and a motion on June 26, 1985 alleging violations of the court's orders, the court referred the case to the magistrate for discovery, a hearing, and a report.

## I. Facts

As the magistrate observed, "[t]his case has a long and embittered history." For at least a decade, Local 1974 and Local 530 have engaged in a jurisdictional dispute over the performance of drywall taping, pointing and skimming, a prefinishing aspect of construction work, on job sites in the New York City area. See Drywall Tapers and Pointers of Greater New York v. Operative Plasterers' and Cement Masons' International Association, 601 F.2d 675 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980); Drywall Tapers and Pointers of Greater New York v. Operative Plasterers' and Cement Masons' International Association, 537 F.2d 669 (2d Cir. 1976). In 1980, Local 1974 obtained an arbitration decision from the Building Trade

Employer's Association of New York City ("BETA") awarding it jurisdiction over certain drywall work. In 1983 Local 1974 charged that Local 530 was not complying with this decision, and presented the Building and Construction Trades' Council with evidence showing Local 530 members were performing work at 31 job sites covered by the arbitration award. The Council announced Local 530 had violated the BTEA order regarding the 31 job sites in November 1983, and plaintiffs sought court enforcement of the Council's decision.

On January 3, 1984, this court issued a preliminary injuction to enforce the Council award, observing that "Local 1974 has been seeking enforcement of the BTEA award for three and a half years" and that "the failure of defendants to

join in trying to resolve this matter militates strongly against them." On January 9, 1984, the court ordered

> that defendant Local 530 of Operative Plasterers' and Cement Mason's International Association, AFL-CIO, its officers, agents, servants, employees and attorneys, and all persons in active concert or participation with any of them who receive actual notice of this Order by personal service or otherwise, be and hereby are enjoined and restrained from asserting jurisdiction over, and from causing and permitting members of such labor union to perform work at, any of the following jobsites within the City of New York and listed the 31 prohibited job sites.

After a five-day trial, this court issued a permanent injunction on February 2, 1984, adding one additional job site to the list. The court noted, without deciding, Local 1974's contention that Local 530 members had performed skimcoating work "as a pretext to justify

the employer's dealing with an 'employer dominated' union such as Local 530 instead of a 'legitimate' union such as Local 1974," and briefly set forth the "evidence in the record from which such a conclusion could be drawn."

In February 1984 Local 1974 filed an order to show cause why, among other things, Local 530 and Improved Drywall Co. should not be held in contempt of this court's orders. On March 9, 1984 this court heard testimony that men known to have formerly belonged to Local 530 had been observed working at prohibited job sites. This court stated it could not find contempt based only on this evidence and told plaintiff's attorney, "[y]ou had better do some discovery and find out what there is there in the union to see whether they have in

fact resigned or not, these people." Transcript of March 1984 Proceedings Before the Court ("Court Tr.") at 2.

After engaging in discovery, Local 1974 renewed its motion for contempt against Local 530 in June 1985, and after the reference to the magistrate he held a full six-day evidentiary hearing. He recommended that Local 530, its President Moscatiello and its attorney Goldman, along with various employer corporations and the principals of those corporations, be held in contempt and pay compensatory damages to Local 1974. He referred the matter to the United States Attorney for consideration of prosecution of Local 530 for criminal contempt. All concerned parties have filed written objections to the magistrate's report and recommendations,

and the court has conducted a de novo review of the record pursuant to 28 U.S.C. § 636(b) (1982).

A. Conduct of Louis Moscatiello and Local 530

This court warned Louis Moscatiello, Local 530's President, at the March 1984 hearing, "[i]f you intend to play games here, you are going to be very, very sorry so don't play games with the Court's order. It is too serious." Court Tr. at 2. Moscatiello testified before the magistrate, however, that after he learned at the hearing that there were persons believed to be members of 530 who had been observed working on the prohibited job sites, "I didn't do anything about it" and he took no disciplinary steps. Transcript of September 1985 Contempt Hearing Before the Magistrate ("Contempt Tr.") at 76. He elabora-

ted his testimony by stating

> I would like to put on record, I made everyone know, including anyone I saw personally, that I wanted no -- I didn't want to be involved with those jobs... What happened at the time, when we got hurt with the -- with the 32 jobs, there was no work around, new work for people to got to -- to to to work. And so, whatever the men wanted to do, I didn't want to be part of it. And a lot of the men realized, I guess, that if they brought it to my attention I would come down on them. Or they would put me in a peculiar situation. Now if the man -- the man has got to go out and make a living. He surely knows not to tell me.

Contempt Tr. at 94. Despite the language in this court's injunctions restraining Local 530 and its officers from "causing or permitting [its] members" from working at the sites, Moscatiello indicated his position was that 530 members could choose to continue to work at those locations without facing discipinary

action as long as the union was not exercising jurisdiction by accepting dues checkoff and fringe benefit payments on their behalf. Even after the second contempt motion was filed, Moscatiello did no more than check a couple of names of 530 members alleged to be working at prohibited sites to see if payments on their behalf has been made to the union welfare funds. Contempt Tr. at 99.

B. Conduct of Robert Goldman

Moscatiello did apparently have qualms about his interpretation of this court's injunctions. He testified that at the March 1984 hearing before the court, he approached his attorney Goldman to "whisper in his ear at the end and I said, please clarify with Judge Nickerson, there's going to be people with the [530] books working out there. I am sure

this is true. And he turned to me and said, Lou, its not important, don't worry about it." Id. Moscatiello also testified that in May or June of 1984, he went to Goldman's office to discuss the order and suggest that a letter be sent to Judge Nickerson to make certain the judge knew what was happening at the job sites but that Goldman instructed him to "just stay away from [the job sites] completely... until we can go in and try to get it reversed." Contempt Tr. at 118-22.

Goldman was trial counsel for Local 530 at the proceedings which led to issuance of the injunction and at the March 1984 hearing. At the March hearing, he told this court

> I would state that after your Honor's decision, a letter was sent to everybody advising them of the injunction that 530

> could no longer assert jurisdiction at this time and people were free to do what they would. Many people in 530 resigned -- why they resigned? They stopped paying dues, and in fact, they had stopped paying dues and other unions have moved in, other organizations have moved in, we have no relationship to them or anything whatsoever. So that, your Honor, I think since [Local] 1974 must be fully aware of these facts that these men are not working as [Local] 530 members.

Court Tr. at 2. Near the end of the hearing, he made

> A fast statement, your Honor. Your Honor, just on the record so there is no cumulative momentum here, I don't have anything other than the [Local 1974] story which I consider to be harassment, if there was suspicion about anything that 530 has done, they have gotten resignations, they are not involved, they do not collect dues.

Moscatiello testified before the magistrate that in fact Local 530 received only seven or eight resignations

as a result of this court's orders, which he showed to Goldman, Contempt Tr. at 134, at a time when about 80 men were involved at the 32 prohibited job sites. Contempt Tr. at 105-06. Moscatiello told the magistrate "[Goldman] indicated to the court all these men either resigned or are resigning, and, you know, he didn't specify the real facts." Contempt Tr. at 100. Goldman reiterated, in an affidavit dated July 26, 1985 and submitted in opposition to plaintiff's motion to hold in contempt, "[i]n fact, Local 530 had received a large number of resignations after the issuance of the injunction and was not attempting to collect work dues from those former members who had resigned. That statement was absolutely correct at the time it was made." July 1985 Affidavit of Robert E.

Goldman ("Goldman July 1985 aff.") at para. 7. In his most recent affidavit, dated September 12, 1986 Goldman claims for the first time that prior to March 9, 1984 Roger Levin, another of Local 530's attorneys, and Moscatiello advised him many members had resigned. September 1986 Affidavit of Robert Goldman ("Goldman Sept. 1986 aff.") at para. 4. The court does not credit this belated allegation.

Moscatiello also testified before the magistrate that Goldman advised him that under the injunctions, Local 530 men could continue to work on the prohibited job sites as long as the union didn't receive dues checkoff or fringe benefit payments. According to Moscatiello, Goldman told him that it was "none" of his business "that they were

non-union on those jobs" because he had "no jurisdiction on these jobs." Contempt Tr. at 101-03. This account is borne out by Goldman's July affidavit statement that "the men observed by Local 1974 were not working as members of Local 530, i.e., not paying hourly work dues to Local 530, and not having fringe benefit contributions paid on their behalf to the Local 530 funds, but as members of other unions or as independents. The fact is that Local 530 in no way participated in, nor could it control, what its former and even present members do in order to earn a living." Goldman July 1985 aff. at para. 6.

Mr. Goldman now contends that he "do[es] not recall" Moscatiello's request at the March 1984 hearing that he make clear to this court that members of

530 who had not resigned were working at the prohibited sites. Goldman Sept. 1986 aff. at para. 15. He states that he is positive Moscatiello's memory of a May or June meeting with Goldman to clarify his statements at the March 1984 hearing and send a letter to this court "is incorrect." This court, however, finds no reason to disbelieve Moscatiello's testimony before the magistrate, which was apparently frank and straightforward and often not in his own self interest.

When the injunction issued, the only action which Moscatiello took to carry out the obligations it imposed on Local 530 was to send notice of it to all 530 members and contractors. A letter was mailed to those persons on January 17, 1984 and a copy of the injunction was sent to the contractors at approximately

the same time. Contempt Tr. at 62-63. The contractors notified included all those who had signed collective bargaining agreements with Local 530. Contempt Tr. at 181. Moscatiello indicated that although the injunctions were the sole topic of conversation for a few months, "t[hen] [the topic] like disappeared. Contempt Tr. at 184.

C. Conduct of Joseph Ianno and B-Drywall.

In January 1984, Joseph Ianno was in the last stages of his apprenticeship as a taper and was employed by Improved Drywall ("Improved") at Republic National Bank, one of the prohibited sites. Contempt Tr. at 280. He testified that he became a heroin addict around March 1984 but Robert Vergera, the owner of Improved, indicated that at the time he employed Ianno, "the kid" already

had "a problem" and his wages were lower than the usual union scale because he came in late and did not come in every day to work. Contempt Tr. at 465, 467-469.

Despite this background Ianno incorporated a company named B-Drywall Finishers ("B-Drywall") on January 19, 1984. Contempt Tr. at 283. It began work at various job sites listed in the injunction with no contract and no pay arrangements, Contempt Tr. at 284-86. Ianno knew of the injunction and saw a copy. Contempt Tr. at 292. The sites B-Drywall worked had been handled by Improved, which employed Local 530 members until it stopped work upon notice of the injunction. Contempt Tr. at 289, 459, 460-461. Ianno's employees were the same men with whom he had worked pre-

viously, Contempt Tr. at 304, almost all of whom were members of Local 530, Contempt Tr. at 310-313. Ianno testified that he resigned from Local 530 and told his men to do likewise, but it appears that a number continued to pay dues to the union. Contempt Tr. at 338-39, 310-313.

Ianno and his men originally worked as non-union men, Contempt Tr. at 376-77, but Alfarone of Local 1974 begain visit-ing the job site to inform Ianno he was violating the injunction. Contempt Tr. at 332. The contractors then told him that he had to sign with a union. He had a friend whose job was parking cars, and asked this friend the name of his union, which, it transpired, was Local 272 of the Teamsters. Contempt Tr. at 325. On the understanding that one Tony

Bracco was "head" of this union, Ianno arranged a meeting with him in a bar. Contempt Tr. at 325, 307.

Bracco supplied Ianno with cards for B-Drywall employees to show they were with Local 272 if Local 1974 visited the job sites. Contempt Tr. at 320-22. On February 22, 1984 Ianno signed a formal contract with Local 272. Contempt Tr. at 328. He had prepaid the initiation fee for some of his employees with a check drawn on B-Drywall, and he sent them to the union with instructions to sign up. Contempt Tr. at 330. He never thereafter used Local 272's hiring hall to hire men, nor did no know what its jurisdiction was. Contempt Tr. at 334-35. B-Drywall went out of business in March 1984. Contempt Tr. at 305, 389. Ianno did not know what happened to his

employees subsequently, but he returned to work for Improved. Contempt Tr. at 366, 351.

D. Conduct of Robert Vergara and Improved Drywall

Robert Vergara is the sole owner and president of Improved. Contempt Tr. at 450. His drywall taping employees at the time this court's orders issued were Local 530 members. Contempt Tr. at 460-461. He employed about 80 men at 12-14 sites including five prohibited sites. Contempt Tr. at 458-59. He pulled his men off these sites after the orders. Contempt Tr. 473, 512. His business suffered financially. Contempt Tr. at 516-21, 533-34.

After Ianno, his former employee, set up B-Drywall and signed with Local 272, Vergara observed that

while he had left the job sites, the same persons continued to work as members of Local 272. Contempt Tr. at 477-78. Vergera talked to Goldman and to his own attorney, Ziskin, who advised him this was legal "[a]s long as 530 men do not go on the job." Vergera testified, "I said, if I join another union, they are not 530 men." Contempt Tr. at 474-76, 532-33. After this consultation, Vergera went to see Bracco and signed an agreement with Local 272. After that he remitted work dues, monthly dues and fringe benefit payments to Local 272. Contempt Tr. at 476-504.

Vergera testified that he told his employees that it they wanted to work for Improved, they had to be Local 272 men, and he prepaid initiation fees for a few workers, as a loan. Contempt Tr. at

496, 503-04. He stated that basically the same men who had worked for him as 530 members now worked for him as Local 272 members, but that he did not know if they still retained membership in Local 530. Mr. Vergara did "hear" that his employees carried union books with Local 530 and Local 272. Contempt Tr. at 528-530. In fact, many of his employees paid dues to Local 530. Plaintiff's Exhibits 40, 41, 44; Defendants' Exhibits OO, R.

When asked if he had ever received workers from Local 272's hiring hall, Vergera testified, "No. They park cars." Contempt Tr. at 489. He was aware that Local 272 did not have jurisdiction over drywall taping. Contempt Tr. at 485. Vergera divided his employees into two work forces, however, using Local 272 employees on prohibited

job sites and Local 530 employees on other sites. Contempt Tr. at 542.

John Alfarone, Local 1974's president, testified that he met with representatives of Local 272 soon after the March 1984 contempt hearing before this court to notify them of the injunction and request that they withdraw their members from the prohibited job sites. He later received a copy of a letter from Bennett, the Secretary-Treasurer of Local 272, to the Teamsters General President stating he would obey his International's orders to break the contract with Improved. Contempt Tr. at 803-12. Bennett confirmed the meeting with John Alfarone and testified that he sent a letter to Improved stating Local 272 could no longer represent its employees. Contempt Tr. at 1140-45. Plaintiffs introduced

both the letter from Bennett to his International and the letter sent to Improved, both dated June 29, 1984. Plaintiff's Exhibits 17, 17a.

Bennett attached a copy of a letter he had received from his International to the letter sent to Vergera. In it, the President of the Teamsters clearly stated "there is a substantial question whether the agreement between Improved and Local 272] is consistent with the permanent injunction issued" by this court. Plaintiff's Exhibit 17a. Nevertheless, Vergera's position at the hearing was that the portion of his workforce on the prohibited job sites was covered by a valid agreement with Local 272.

E. Conduct of Harold Heustein and Woodworks Construction

Mr. Harold Heustein is the sole

owner of Woodworks Construction Company ("Woodworks"). Contempt Tr, at 560-61. He employed Local 530 men at two prohibited job sites before this court's orders issued under a contact with Local 530. Contempt Tr. at 564-65, 571-72. He received a copy of the order and stopped work on approximately January 17, 1984 as a result. Contempt Tr. at 563, 566, 569. He suffered financial losses. Contempt Tr. at 659-60. He testified, however, tht he "heard what other contractors were doing" and that it was "talk on the job" and "talk of the industry" that if he did not remit work dues or pay fringe benefits, his employers would be working "nonunion." Contempt Tr. at 669, 645-55. He testified his understanding of the order then was that what he had to do as an employer was "[w]ork non-union or hire

Teamsters." Contempt Tr. at 651.

Although he could not recall how he heard of Local 272, Heustein contacted them and signed an agreement with them on February 22, 1984, after the permanent injunction had issued. Defendants' Exhibit K. This was the same date Improved signed with Local 272. Defendants' Exhibit H. Heustein testified that it was because he had to employ men at sites where Local 530 men were not permitted to work that "I entered into an agreement with Local 272 to furnish men to do this work." Contempt Tr. at 577.

These sites were the same two at which Woodworks had worked earlier, and Heustein employed the same men. Contempt Tr. at 578-579; Plaintiffs' Exhibit 40. He knew Local 272 was a union of parking lot attendants, but

"assumed [they] would be able to furnish some men." Contempt Tr. at 586. He told his men that only those who were not members of 530 could work for him and some signed up with Local 272 as "[t]hey knew I had a contract with the Teamsters." Contempt Tr. at 579-80. The only way Heustein assured himself his employees on prohibitive sites were not 530 members was by not paying benefits to Local 530. Contempt Tr. 574-75. In fact, many of his employees had been and continued to be dues-payment members of Local 530. Plaintiffs' Exhibit 40.

F. Conduct of Carmine Pistons and Primo Construction

Carmine Pistons testified before the magistrate as a witness. His attorney was present. Contempt Tr. at 1013. Pistone is a founder, stockholder, officer and director of Primo Construc-

tion, Inc. ("Primo"). Prior to issuance of the preliminary injunction, Primo was working at one of ths prohibited job sites. Contempt Tr. at 1020-21. He employs 412 tapers, each of whom belongs to Local 530, and he has a collective bargaining agreement with Local 530. Contempt Tr. at 1046, 1019. He know of the lawsuit and he received a letter from Local 530 on January 17, 1984 advising him that this court had issued a preliminary injunction but does not recall if he recevied a copy of the order. Contempt Tr. at 1019-20. He continued to work on the prohibited site, but utilized subcontractors to do taping, not his own employees. Contempt Tr. at 1021. He subcontracted to B-Drywall for 3-5 months but then got phone calls from Local 530 and the general contractor to notify him

that there was a jurisdicitional problem and he was to remove the men. Contempt Tr. at 1022. He brought in Improved to complete the job. Contempt Tr. at 1024.

John Alfarone of Local 1974 testified that he sent a copy of the order to every employer for whom he had an address, and plaintiffs produced copies of postal receipts, including one for a mailing to Primo. Contempt Tr. at 1103; Plaintiffs' Exhibit 32. Frank Alfarone of Local 1974 testified that he had two conversations with Pistone. The first, he said, took place on January 17, 1984 when he gave nine workers at the prohibited job site who said they were members of Local 530 copies of the injunction. He then talked with Pistone on the telephone and gave him the names of two independent Local 1974 contrac-

tors. Frank Alfarone said he met with Pistone on February 6 or 7, gave him the permanent injunction papers, and Pistone said he was going to take the men off the job and give it to one of the 1974 contractors. Contempt Tr. at 712-21.

Pistone confirmed he met with Frank Alfarone, who asked him if he know there was a jurisdictional problem between Local 530 and Local 1974. Pistone said he did, and was trying to get someone else to do the job. Pistone testified he then called at least one of the two contractors suggested by Alfarone but they were unable to supply him with men. Pistone thus felt he "had no other choice but to go out in the street and find someone else," and he settled on Improved, which told him it "was from another local that wasn't under any

jurisdictional problems." Contempt Tr. at 1024-26. Many of the Improved men who then worked on the job site were members of Local 530. Plaintiffs' Exhibit 40.

## II. Magistrate Caden's Report and Recommendations

Based on the foregoing facts Magistrate Caden found that plaintiffs established by clear and convincing evidence that Local 530, its President Louis Moscatiello and its attorney Robert Goldman were liable for civil contempt. He also found that the employers had actual notice of the order and were liable in contempt for knowingly violating it. As noted above he referred the case to the United States Attorney's office for further investigation and prosecution of Local 530 for criminal contempt. He concluded that he had the

contemptuous conduct not occurred, Local 1974 would have performed all the work at the prohibited job sites. He thus recommended compensatory damages totalling $957,196.40 for the dues, fringe benefit payments and wages it and its members would have received. Because he found that the violations of this court's orders had been willful, Magistrate Caden also recommended plaintiffs receive the sum of $62,050.86 in attorney's fees and costs. All the parties held in contempt have objected to the magistrate's report and recommendations.

III. Parties' Contentions

A. Contentions of Louis Moscatiello and Local 530

Local 530 and Moscatiello contend that the magistrate erroneously interpreted the injunctions as creating a "resign or discipline" obligation. They

say he incorrectly found that the injunction required them either to make Local 530 members resign before working at prohibited sites or discipline members who nonetheless worked at the sites. This contention misreads the magistrate's report.

The magistrate did not misinterpret the injunctions. He correctly observed that the court's orders unambiguously restrained Local 530 and those in privity with it from "causing or permitting" its members to work at the prohibited sites. After discussing the evidence on noncompliance, he properly focussed on Local 530's utter failure to take any action, other than notifying them of the injunctions, to prevent its members from working at the job sites. His report thus follows the standard for

civil contempt, which requires: 1) a clear and unambiguous order; 2) clear and convincing proof of noncompliance; and, 3) failure by defendant to be reasonably diligent and energetic in attempting to accomplish what was ordered. Powell v. Ward, 643 F.2d 924, 931 (2d Cir. 1981), cert. denied, 454 U.S. 832.

Local 530's inaction demonstrates lack of reasonable diligence and energy in obeying this court's orders. Indeed, where the evidence shows, as here, that the president of a union knows an injunction will be and and is being disobeyed by its membership, its knowing tolerance of the disobedience constitutes ratification of the contemptuous conduct. United Mine Workers v. Gibbs, 383 U.S. 715, 738-49 (1966); National Labor Relations Board v. Teamsters, Chauffeurs,

Helpers & Taxicab Drivers, 592 F.2d 921, 928 (6th Cir. 1979).

The magistrate was also correct in finding that because Local 530 members were not expelled until a year of nonpayment of dues, Contempt Tr. at 240, none was disciplined with expulsion or otherwise, and only a handful resigned, the injunctions were violated by those who worked at the prohibited job sites within a year of paying dues.

Local 530 and Moscatiello also contend that the injunctions were insufficiently specific to provide notice of the conduct enjoined. They observe that they did not in terms forbid Local 530 members from working at the sites on a non-union basis or as members of another union, or require them to resign before working at the sites. The

injunctions do, however, specifically prohibit Local 530 and its officers from "causing or permitting members of such labor union to perform work at" listed job sites and make no exception for members who claim not to have worked as members.

That Local 530 members called themselves nonunion or Local 272 workers while retaining their affiliation with Local 530 does not absolve Local 530 from its obligation to comply with the injunction. Local 530's good faith in making this contention is questionable in light of its president Moscatiello's admitted failure to do anything to determine the basis on which Local 530 members were working at prohibited sites. The injunction's command is clear, and elaboration was not required to forbid

all the tortured interpretatins defendants might devise to evade it. National Research Bureau, Inc. v. Kucker, 481 F. Supp. 612, 615 (S.D.N.Y. 1979).

Local 530 and Moscatiello further argue that the purpose of the injunctions was the withdrawal of Local 530 from the job sites, and that this purpose would not be furthered by assuring that local 530 members working at the sites had resigned or were disciplined. They say the injunction was not designed to give Local 1974 jurisdiction over the sites. These assertions are meritless. The very reason Local 1974 sought the injunctions was to enforce the BTEA's award of jurisdiction over the job sites to it, and this court found the award was correct when it issued the injunctions. Plainly, this

purpose was frustrated when Local 530 members continued to work at the job sites and Local 530 and Moscatiello did nothing about it. Defendant's inaction violated both the letter and the spirit of this court's in-junctions. National Research, supra.

Local 530 and Moscatiello also assert that the union was barred from disciplining its members who worked on the sites on a nonunion basis or under the jurisdiction of another union. They cite the Labor Management Reporting and Disclosure Act, 29. U.S.C. § 411 et seq. (1982), which protects union members' rights of free speech and assembly, including their right to join rival unions. Section 411(a)(2) of that act, however, contains a specific proviso which states "nothing herein shall be

construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member...to refrain[] from conduct that would interfere with [the organization's] performance of its legal or contractual obligations." Even assuming Local 530 could take no action against members merely for joining Local 272, it was certainly free to discipline those who also worked on job sites specifically covered by an injunction which bound the union.

Local 530 and Moscatiello also say they were prohibited under the Labor-Management Relations Act, 29 U.S.C. § 141 et seq. (1082) and 29 U.SC. §-158(b)(2) (1982) from causing or counselling the employers to fire or not to hire members who joined Local 272. It is true that

unions are forbidden to cause employers to discriminate against employees who have exercised their right to engage in collective action by selecting or organizing a rival union, but these provisions are irrevelant here.

Even if the only action Local 530 could have taken to carry out its obligations under the injunction was to pressure employers, any firing or refusal to hire on the specified job sites would be based on an employee's continued affiliation with Local 530, not his membership in Local 272. The facts of this case also indicate that Local 272 was not a rival to Local 530, but an entity whose existence allowed Local 530 to retain membership it would have lost had it not permitted its members to work on the sites. The facts further indicate

that the employees who signed with Local 272 did so at their employer's direction, rather than independently exercising their rights to engage in concerted action.

Local 530's citation of 29 U.S.C. § 158(b)(2) for the proposition that unions are prohibited from causing an employer to discriminate against an employee whose membership in the union has been terminated is wholly inapposite. The evidence shows that Local 530 did not terminate any of its members.

Local 530 and Moscatiello also reply on 29 U.S.C. § 157 & 158(b)(1)(A) (1982), which protect an employee's rights to refrain from engaging in concerted activities and prohibit unions from interfering with the exercise of this right. They claim these provisions

prevented them from disciplining Local 530 members who worked nonunion. Section 158(b)(1)(A) contains a proviso, however, that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." Local 530 was free to require the resignation of its members or expel them for working on the job sites. It was free in any event to discipline them for working on prohibited job sites, as opposed to doing so for simply working nonunion. Because these members retained their affiliation with Local 530, moreover, they arguably were not exercising any right to refrain from engaging in concerted activity.

Local 530 and Moscatiello further contend that if the injunction

requires Local 530 members to resign to work at the job sites, or requires the union to expel non-resigning membership, it violates the first amendment rights of the members to freedom of association. This argument is in effect an attempt to relitigate the validity of the injunctions. See National Labor Relations Board v. Local 282, 428 F.2d 994, 999 (2d Cir. 1970). It is also meritless. The injunction limits the places where Local 530 can permit its members to work. It speaks not at all to the members' right to choose to belong to Local 530. See Drywell Tapers and Pointers of Greater New York v. Operative Plasterer's and Cement Masons' International Association, 537 F.2d 669, 673-76 (2d Cir. 1976), which upheld a similar injunction against Local 530 and stated "[t]he injunctive

relief sought here will not infringe upon the workers' organizational or bargaining rights." See also International Longshoreman's Association v. Waterfront Commission of New York Harbor, 642 F.2d 666, 670-71 (2d Cir. 1981), cert. denied, 454 U.S. 966, (rejecting first amendment challlenge to law that prohibits union dues collection after union officer is convicted of crime because "the right to associate is not absolute" and the law provides a "prompt and effective remedy" to the problem).

Local 530 and Moscatiello claim tht the union could not discipline its members because their conduct did not violate its constitution. They admit that the union could discipline a member acting in violation of a court order, but say Local 530 had no further rights as to

the prohibited job sites after the injunctions issued. This argument simply ignores Local 530's obligation to comply with an injunction against permitting its members to work at the prohibited sites and the disciplinary provisions in its constitution. See Defendants' Exhibit II; Contempt Tr. at 982, 986-87, 996-99.

Local 530 and Moscatiello also argue that all post-injunction work at the prohibited sites was performed nonunion or under the jurisdiction of other unions. They point out that some workers joined Local 530 after the injunction issued, some ceased to pay dues, seven worked only until they were notified of the injunction around January 17, and many others worked at prohibited sites only sporadically. They also claim the magistrate failed to provide them

with a "formula" to determine which members should have been disciplined or what standards should have been applied."

That some workers did not pay dues and others worked only sporadically does not excuse Local 530 from failing to make any effort to prevent its members from working at the sites. The facts show tht Moscatiello and others took no action, that they consciously avoided acknowledging or discussing their members' disobedience of the order although they anticipated it would occur, and that they resorted to strained and implausible inerpretations of this court's clear, reiterated orders. They were bound as soon as the court's preliminary injunction of January 3, 1984 was filed on January 9, 1984. Because one member, Joseph Barrone, did not work

after this date, Local 530 and the other parties are not liable for his conduct or for hours worked by other members prior to January 9. The other arguments are meritless.

B. Contentions of Robert Goldman

Robert Goldman, like the other parties not named in plaintiffs' motion to hold in contempt, contends the magistrate's findings should be rejected on due process grounds. He argues that he was not served with the motion or provided with an opportunity to participate in the hearing, to be represented by counsel, to cross-examine witnesses and to present his defense. It is true that plaintiffs failed to follow Local Rule 43, which requires that a proceeding to adjudicate a person in civil contempt must be commenced by service of process.

Due process does not, however, require more than "'suitable notice and an adequate opportunity to appear and be heard.'" Securities and Exchange Commission v. VTR, Inc., 410 F. Supp. 1309, 1313 (D.D.C. 1975). Failure to provide formal notice, where a person has actual knowledge of the nature of the contempt proceeding against him, does not violate due process. In re Sadin, 509 F.2d 152, 1256 (2d Cir. 1975); United States v. Handler, 476 F.2d 709, 712 (2d Cir. 1973). Goldman admits he was put on notice in July 1985 that Local 1974 had argued to the magistrate that Goldman made false representations to this court at the March 1984 hearing, and that he was supplied with an affidavit and memorandum so stating filed by plaintiffs' counsel. Goldman Sept. 1986 aff. at

para. 9. In fact, he prepared and filed an affidavit responding to plaintiffs' claims. Goldman July 1985 aff. He plainly was on notice of the nature of the charges against him at the contempt hearing, but aside from sending a letter to the magistrate after the hearing, he took no further action.

Due process does not mandate an evidentiary hearing on a charge of civil contempt in every case. When a person put on notice fails to demand a hearing or present an argument that creates a material issue of fact, an evidentiary hearing, with all it entails, is not required. Commodity Futures Trading Commission v. Premex, Inc., 655 F.2d 779, 782 n.2 (7th Cir. 1981); United States v. Danenza, 528 F.2d 390, 392-393 (2d Cir. 1975); International Business Machines

Corporation v. United States, 493 F.2d 112 (2d Cir. 1973), cert. denied, 416 U.S. 995 (1974). The standards are stricter for criminal contempt and this circuit has applied those standards in civil contempt cases where imprisonment is a risk, but has stated, "[w]e need not and do not decide whether the due process clause extends the same degree of protection to civil contemnors who do not face imprisonment." In re Rosahn, 671 f.2d 690, 697, (2d Cir. 1982). Here Goldman made no application for a hearing and still has not presented an argument that raises a material issue of fact.

Goldman contends that the record does not support a contempt adjudication. He asserts that his statements to this court at the March 9, 1984 hearing were proper legal argument

and were accurate according to his understanding that Local 530 members on the jobs were not working "as 530 members." He says his statements did not cause or permit Local 530 members to violate the injunction. The statements for which the magistrate recommended Goldman be held liable for contempt, however, were not legal arguments. They were factual representations that "many" of Local 530's members had resigned and that Local 530 had gotten resignations and was not involved. Read fairly, his statements conveyed the false message that Local 530 members were not working "as 530 members" because they had resigned and joined other unions. Moscatiello testified before the magistrate, however, that only seven or eight members resigned and that he told Goldman

at the March 9, 1984 hearing that he knew Local 530 members would be working at the sites. Moscatiello's testimoney was frank, and the court finds it credible.

Goldman's statements before this court were misrepresentations made without any factual basis that would support an inference of good faith. Moreover, the record of the March 1984 hearing shows that plaintiffs' contempt motion was dismissed because they were unable to prove that the Local 530 members observed at the sites were in fact still affiliated with Local 530. Goldman's misrepresentations substantially contributed to this result and enabled Local 530 members to continue to work at the sites in violation of this court's orders. Goldman did "cause or permit" this misbehavior while bound by the

injunction as an attorney for Local 530.

Although the magistrate in recommending contempt liability did not rely on the advice Goldman gave Local 530, this court views that advice as further evidence of contempt. Goldman told Moscatiello and, it appears, Vergera, that Local 530 men could continue to work on the sites as long as the union did not receive dues or fringe benefit payments. He told Moscatiello that his union had "no jurisdiction" on the sites and should "stay away from [the job sites]" until the injunction could be reversed. He discouraged Moscatiello from sending a letter to this court clarifying the situation at the sites.

Goldman was trial counsel at the hearing held before the permanent injunction issued, and knew it was

intended to enforce the award of jurisdiction over the sites to Local 1974. His interpretation of the order was contrary to its clear language and purpose. Moreover, by advising the union to do nothing, Goldman directly promoted 530's and Moscatiello's contemptuous conduct. His misrepresentations to this court and his unjustified advice to Local 530 and Moscatiello support a finding of willful contempt. See United States v. Greyhound Corporation, 508 F.2d 529, 531-22 (7th Cir. 1974); W.E. Bassett Company v. Revlon, Inc., 435 F.2d 656, 662-63 (2d Cir. 1970).

C. Contentions of Joseph Ianno and B-Drywall

Ianno and B-Drywall object to the magistrate's report and recommendation on the ground they were denied due process. They contend that they were not

served as required by Local Rule 43 and that they did not participate in the contempt hearing before the magistrate and were not afforded an opportunity to do so. However, Ianno was called as a witness before the magistrate, and the attorney now appearing for him was present at the time. Contempt Tr. at 275. He earlier testified at a desposition concerning the contempt motion in plaintiffs' attorney's office, Contempt Tr. at 362. B-Drywall was served with a deposition notice in October 1984 which specifically requested production of payroll reports for named prohibited jobsites, corespondence with Local 530 or Local 272, bargaining agreements with these unions and contracts for drywall work at named prohibited sites. Exhibit A of Affidavit of Robert Vergera (August

28, 1986). Ianno was also subpoenaed to testify at the March 1984 contempt hearing before this court, Court Tr. at 4.

Although the formalities of Local Rule 43 were not followed, its purpose of providing actual notice was served. Cf. Bethlehem Mines Corporation v. United Mine Workers of America, 476 F.2d 860, 863-64 (3d Cir. 1973). Moreover, although Ianno knew in advance of the hearing before before the magistrate, and attended and testified at length as a witness, neither he nor his attorney ever requested that they be heard or permitted to put in additional evidence. Even now, Ianno and B-Drywall have not presented any material issue of fact to this court which would warrant a further evidentiary hearing.

Ianno and B-Drywall contend that any action they engage in at the prohibited job sites was merely in furtherance of their contractual commitments to finish work at those sites. To be held liable in contempt, a non-party to an injunction must either aid and abet the defendant or must be legally identified with the defendant. Vuitton et Fils S.A. v. Carousel Handbags, 592, F.2d 126, 130 (2d Cir. 1979); Backo v. Local 281, 438 F.2d 176, 180-81 (2d Cir. 1970), cert. denied, 404 U.S. 858 (1971), (quoting Alemite Manufacturing Corporation v. Staf, 42 F.2d 882, 883 (2d Cir. 1930). A non-party must also have actual notice of the order. Vuitton, supra, at 129. Federal Rule of Civil Procedure 65(d) provides that persons are bound when these conditions are met.

This court's order tracked the language of Rule 65(d) in enjoining Local 530, its agents, officers, servants, employees and attorneys and "all persons in active concern or participation with any of them who receive notice of this Order." Ianno's claim that the magistrate erred in finding he had actual notice of the injunction is contradicted by his testimony that he saw a copy of it. Ianno further testified that John Alfarone visited his job site and told him he was violating the injunction. Ianno's claim that this court lacks personal jurisdiction over him and B-Drywall is meritless. Vuitton, supra, at 129; Folsom v. Blum, 554 F. Supp. 828, 830 (S.D.N.Y. 1982).

Local 530 was plainly permitting its members to work at the sites at the time because Ianno was employing them

as B-Drywall without any action from the union. He directly aided and abetted this contemptuous conduct by signing his men up with Local 272 to keep them at the site, although he had worked with them as a Local 530 member previously and they retained their affiliation with Local 530. In fact, Ianno formed B-Drywall and employed his fellow union members only two days after Local 530 sent letters regarding the injunction to all of its members, necessarily including him. This affirmative action to prevent the order from being obeyed is sufficient to hold him and B-Drywall in contempt. Backo, supra, at 181, 181 n.2. Moreover, volitional acts by one who krows or reasonably should know the conduct is wrongful demonstrates willful contempt. United States v. Greyhound Corporation,

508 F. 529, 531-31 (7th Cir. 1974); Hudson Transit LInes, Inc. v. Freund, 509 F. Supp. 1172, 1177 (E.D.N.Y. 1981). That Local 1974 warned Ianno he was violating the injunction supports the conclusion that he was willfully contemptuous. See Greyhound, supra, at 534.

D. Contentions of Robert Vergera and Improved Drywall

Robert Vergera and Improved also contend that they did not receive due process. Citing criminal contempt cases, they complain they did not receive notice, an opportunity to be heard, represenation by counsel, or the chance to testify and call witnesses on their behalf. It is plain, however, that they received ample notice. Vergera was present in the magistrate's courtroom on September 19 and Septem,ber 20, 1985 and his attorney was there on the day he

testified as a witness. Contempt Tr. at 48, 275.

As early as January 10, 1984 Vergera sent a handwritten letter to this court quoting the preliminary injunction in full, listing the prohibited job sites on which Improved was employing 530 members, and stating tht "[t]his injunction puts Improve Drywall in a severe predicament because we don't know how to complete our contract without members of 530." Letter from Robert Vergera (January 10, 1984) ("Vergera Letter"); Plaintiff's Exhibit 30. He was present at the evidentiary hearing held before this court issued the permanent injunction and at portions of the March 1984 contempt hearing. Contempt Tr. at 453-54.

He and his wife, who also owns

a company which employed 530 members and which shares an office with Improved, pulled all their workers off the prohibited job sites after the orders issued. Contempt Tr. at 473, 512, 403-04, 396-97. He was sent notices of deposition from plaintiff's attorneys in October 1984 and August 1985 which specifically stated the topics to be explored would include Improved's performance of drywall construction work, the location of the sites on which such work was done, and the identities and period of employment of employees performing such work.

Vergera was also subpoenaed to testify in this court in August 1985 regarding plaintiffs' contempt motion and was ordered to bring specified documents, including collective bargaining agreements covering the performance of drywall

work, letters showing resignations by employees from Local 530, and records of contributions made to 530 on behalf of named employees. Exhibit A of Affidavit Robert Vergera (August 28, 1986); Contempt Tr. at 462-63.

Vergera's claim that his attorney, though present, "was not permitted to speak on my behalf or address the court in any manner," Affidavit of Robert Vergera (August 28, 1986) at para. 10, is utterly unsupported by the record of the proceedings before the magistrate. Rather, neither Vergera or his attorney ever requested an opportunity to be heard further or address the magistrate. Nor, then or now, have they presented a material issue of fact warranting further evidentiary proceedings.

Vergera clearly received actual

Vergera clearly received actual notice of the injunction and his assertion that this court lacks personal jurisdiction over him and Improved is consequently meritless. Vuitton, supra; Folsom, supra.

As his letter to this court in January 1984 demonstrates, Vergera understood from the outset that the order barred him from employing 530 members at the prohibited job sites. He manifested this understanding by pulling his Local 530 employees off the sites. When he observed that Local 530 men were working for B-Drywall without objection from the union, however, he signed with Local 272 and sent his men to sign up with that organization. Many of his employees continued to pay dues to Local 530, he heard that they had both Local 272 and

Local 530 books, and Local 1974 officials told him he was violating the injunction. Local 272 disclaimed its contract with him under orders from its international organization because of the injunctions. Vergera plainly took affirmative action to aid and abet Local 530 in its contemputous conduct. He received ample warning that his conduct was wrongful. He and Improved were willfully contemptuous of this court's orders.

Vergera and Improved contend that the magistrate miscontrued the court's injunctions. They argue that if Improved had denied employment to individuals unless they resigned form Local 530, it would have been discriminating on the grounds of union membership in violation of the National Labor Relations Act, 29, U.S.C. §§ 157 &

158(a) (1982). They say the injunctions are consistent with this statute only if they are interpreted to prohibit Improved from having a collective bargaining agreement with Local 530.

This reading ignores the language in the injunction forbidding Local 530 and those with actual notice of the order from causing or permitting its members to work at the job sites. The injunctions did not prohibit Improved from ever employing Local 530 members solely because of their union membership. They prohibited only the presence of these members on specific job sites not under Local 530's jurisdiction. Improved was free to hire Local 530 members and employ them anywhere else. It could have obeyed the order consistently with its federal legal obligations, but chose not

to do so.

Vergera and Improved also contend that if the orders are interpreted to require that Local 530 members resign from that union in order to work on prohibited sites, they would unconstitutionally infringe on the right of freedom of association. Even if Vergera and Improved have standing to make this assertion, it is meritless for reasons already discussed.

E. Contentions of Harold Heustein and Woodworks Corporation

Harold Heustein and Woodworks claim that they, too, did not receive due process of law. They were plainly on notice of the charges against them. Heustein testified as a witness before the magistrate. His attorney, Lesser, was present. Contempt Tr. at 567. On January 9, 1984, Heustein sent a letter

order and stating that because his company employed 530 men at two prohibited job sites, "Woodworks will be compelled to stop work at these two (2) jobs or be subject to being held in contempt of the Court's order." Letter from Harold Heustein (January 9, 1984). When he learned of the order, Heustein stopped work. Contempt Tr. at 566. He received notices of deposition and demands for records from both plaintiff's and defendant's attorneys in July and August 1985, indicating that among the topics addressed would be drywall work performed by Woodworks, contracts and records pertaining to drywall work at two specified prohibited job sites, identities of employees at these sites, and the periods they worked. Heustein was also subpoenaed as a witness in the

proceedings on plaintiffs' contempt motion before this court in August 1985 and ordered to produce similar records. Exhibit B of Affidavit of Harold Heustein (August 5, 1986). Heustein's letter to this court shows that he knew from the outset tht the actions he later took would subject him to the risk of contempt.

Heustein and Woodworks argue that "[i]n effect, a close-door trial has been held in the absence of the defendant[s]." This assertion is remarkable in light of the fact that Heustein testified, with his attorney present, in open proceedings before the magistrate. His attorney was not forbidden to speak on his behalf or address the court; he simply did not attempt to do so. Neither Heustein nor his attorney asked to be

heard further, and he still has not raised material issues of fact as to his and Woodwork's liability for contempt.

Heustein had actual notice of this court's orders. He plainly understood their import because he initially withdrew his Local 530 employees from the job sites. When other contractors signed with Local 272 to maintain their Local 530 job force, and Local 530 did nothing, Heustein followed suit. He knew Local 272 was a union of parking lot attendants, and he employed dues-paying Local 530 members. He did nothing to ascertain the union membership of his men, but many were the same men he had employed under a collective bargaining agreement with Local 530. Heustein and Woodworks plainly took affirmative action to aid and abet Local 530's contemptuous

conduct, under circumstances indicating they knew their actions were wrongful, and therefore are liable for willful contempt.

Heustein and Woodworks contend they believed they could work on the job sites with non-union and non-Local 530 personnel and the only method available to them to discover their employees' union membership was to determine what union accepted the dues and benefits remitted on behalf of a particular employee. Heustein and his company were correct in their belief that they were free to employ non-Local 530 personnel. They chose to employ Local 530 personnel. That they did not remit dues and benefits to Local 530 does not excuse their actions. Heustein and Woodworks' claim that when they employed the same faces as

before they were not aware they were in violation of the injunctions simply defies belief.

F. Contentions of Carmine Pistone and Prime Construction

Carmine Pistone and Primo also contend they were denied due process. It appears that the only notice Mr. Pistone received of the contempt proceedings was through a subpoena to appear and his testimony as a witness before the magistrate. Even if this were enough to find Pistone and his company had notice and an opportunity to be heard, the evidence of their contempt was not sufficiently clear and convincing. See Powell v. Ward, supra, at 931. Pistone did subcontract to B-Drywall and Improved, but he testified that he pulled B-Drywall off the job sites because of the jurisdictional dispute and employed

Improved only after he contacted a Local 1974 contractor without success. He also testified that Improved told him it was from another local not affected by any jurisdictional dispute. There are indications in the record that Pistone may have been aware there were Local 530 men at his job site in violation of the injunction, but this evidence is not strong enough to support a contempt finding.

IV. Damages

Magistrate Caden recommended damages be awarded to plaintiffs based on the total number of hours worked at the prohibited job sites after the preliminary injunction issued. The magistrate reasoned that had Local 530 and the other parties not disobeyed this court's orders, Local 1974 would have obtained

jurisdiction over the sites and was entitled to recover the wages, dues and fringe benefit payments it would have received, as well as attorneys fees in light of the parties' willful contempt.

The parties were not, however, bound by the injunctions until they received notice of them. Federal Rule of Civil Procedure 65(d). Local 530 and its president Moscatiello were bound from January 9, 1984, the date the preliminary injunction was filed. Goldman was trial counsel to Local 530 at the evidentiary proceedings before the permanent injunction issued and was bound on February 6, 1984, the date it was filed. Ianno and B-Drywall, Vergera and Improved and Heustein and Woodworks were on notice at latest on January 17, 1984, when Local 530 informed them of the preliminary

injunction.

The court's orders enjoined defendants, its agents and those acting in concert with them from asserting jurisdiction and from causing or permitting members of Local 530 to perform work at specified sites. If the employers had actually employed only non-Local 530 men, they would not have violated the orders. Damages not may be awarded except for the hours that Local 530 members were employed after the parties were bound, not for the total number of hours by all employees at the sites.

Although a union has standing to bring suit on behalf of its members for declaratory or injunctive relief, and may recover damages owed to its members because of a breach of a contract the union enters on their behalf, it does not

otherwise have standing to recover their damages. Drywall Tapers and Pointers of Greater New York v. Local 530 of Operative Plasterers and Cement Masons International Association, 91 F.R.D. 216, 218 (E.D.N.Y. 1981), aff'd, 742 F.2d 1432 (2d Cir. 1984) and cases cited. Plaintiffs therefore may recover directly only the union dues not paid to Local 1974 and attorneys fees.

However, Local 1974 has standing to establish for its members the fact of the contempt from which injuries to those members plainly flowed. See International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock, 106 S.Ct. 2523, 2528-32 (1986). The employers testified that they signed with Local 272 because they could not work on a non-

union basis. It is undisputed that the supply of qualified drywall workers is limited. Thus it is fair to conclude that the employers would have employed Local 1974 instead of persons who had not resigned from Local 530.

Therefore each Local 1974 member who was qualified as a drywall taper and unemployed while Local 530 members were working on those sites, and who would have been assigned under Local 1974 practices to do that work, see Contempt Tr. at 1230-321, was damaged in the amount of the wages he would have received at the Local 1974 wage rate then applicable. Local 1974 was itself damaged by whatever loss of dues it suffered because its members were not working.

Some of the employers contend

that to award dues already paid to Local 272, wages already paid to Local 530 workers, and fringe benefit payments already made to Local 272's funds amounts to a punitive damage assessment. However, Local 1974, its members and its fund trustees are entitled to compensation for the damage inflicted on them by the employers' contemptuous acts. Their compensatory relief should not be denied because of the adverse consequences to employers flowing from their own wrongful conduct.

In addition the Trustees of the Local 1974 funds were damaged in the amount of the fringe benefits that would have been paid had the Local 1974 members been working on the sites.

Of course, the ceiling as to each of the foregoing categories of

damages is dependent on the number of hours of work by Local 530 members for which each person held in contempt is responsible. Those hours are readily calculated by using Schedule A of the magistrate's report, which no party has challenged.

On the basis of that schedule the court finds that Local 530 and Moscatiello are responsible for a maximum of 24,431 hours worked by Local 530 members at prohibited sites after January 9, 1984. Of this total amount the following are jointly and severally responsible for the following maximums of hours; Robert Goldman for 21,087.5 hours worked after February 6, 1984; Robert Vergara and Improved for 11,714 hours worked after January 17, 1984; Harold Heustein and Woodworks for 6,623.5 hours

worked after January 17; and Joseph Ianno and B-Drywall for 5,070 hours worked after January 17, 1984.

By applying the appropriate Local 1974 wage rates, the dues check off rates, and the fringe benefit rates (all as set forth in Schedule B of the Magistrate's report), a calculation may be made of the amounts of damages due (a) to each member of Local 1974 entitled to damages, (b) to Local 1974 for dues, and (c) to the Trustees for fringe benefits. The maximum dollar amounts for which each person could be jointly and severally liable for those categories of damages is calculable by applying the aforementioned rates to the hours for which that person is responsible. The court calculates the combined total maximum figure of such damages to be $542,863.37.

In addition, since the contempt was willful, the persons held in contempt are jointly and severally liable for plaintiffs' attorneys' fees and costs in the amount of $62,050.86. That amount is due and payable as of the date of filing of this memorandum and order.

The matter is referred to the magistrate before whom the following may file claims: (a) the members of Local 1974 eligible for damages under this decision, (b) Local 1974, and (c) the Trustees. The magistrate shall set a reasonable date for the filing of claims, shall hold whatever hearings are required to establish the validity of claims, shall compute the amount of damages due to each claimant entitled to damages, and shall recommend a final judgment to the court.

Magistrate Caden's report and recommendation is adopted as modified by this memorandum and order. So ordered.

Dated: Brooklyn, New York
December 12, 1986

Eugene H. Nickerson,
U.S.D.F.

**APPENDIX D**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

| | |
|---|---|
| DRYWELL TAPERS OF GREATER NEW YORK LOCAL 1974, et al., | 81 Civ. 337 |
| Plaintiffs, | |
| -against- | AMENDED JUDGMENT |
| Local 530 of OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, et al., | |
| Defendants. | |

Pursuant to the report and recommendation of U.S. Magistrate John L. Caden which is adopted by the undersigned, it is hereby ORDERED

1. That the benefit funds, listed below, are to receive from the contemnors damages in the amounts enumerated below:

| | |
|---|---|
| Drywall Tapers of Greater New York Local 1974 Insurance Fund | $87,525.85 |

| | |
|---|---|
| Drywall Tapers of Greater New York Local 1974 Pension Fund | $11,238.56 |
| Drywall Tapers of Greater New York Local 1974 Annuity Fund | $39,784.48 |

2. That the thirty-eight individuals named in Appendix A for whom an amount of money is listed in the "Award" column of Appendix A are to receive from contemnors the amount listed in the "Award" column for that individual.

3. That the contemnors listed below are jointly and severally liable up to the maximum amounts listed below, it being understood that the total collective liability of the contemnors to the benefit funds and individuals shall not exceed $542,863.37.

(a) Local 530 and Louis Moscatiello (24,431 hours) are liable for

the total damage award of $542,863.37; $138,548.89 of which is due and owing the funds; the difference (representing a modification from the report and recommendation) of $404,314.48 is due and owing the claimants as reflected in the "Awards" column of Appendix A.

(b) Robert Goldman (21,087.5 hours) is liable for $462,970 of the $542,863.37 maximum damage award; of which $119,665.50 is due and owing the funds; $343,304.50 is due and owing the claimants as reflected in the "Awards" column of Appendix A.

(c) Robert Vergara and Improved Drywall (11,714 hours) are liable for $257,130.11 of the $542,863.37 maximum damage award; $66,426.29 of which is due and owing the funds; $190,703.92 is due and owing the claimants as

reflected in the "Awards" column of Appendix A.

(d) Harold Heustein and Woodworks (6,623.5 hours) are liable for $145,413.76 of the $542,863.37 maximum damage award; of which $37,559.66 is due and owing the funds; $107,830.60 is due and owing the claimants as reflected in the "Awards" column of Appendix A.

(e) Joseph Ianno and B-Drywall (5,070 hours) are liable for $111,413.76 of the $542,863.37 maximum damage award of which $28,874.16 is due and owing the funds; $82,539.60 is due and owing the claimants reflected in the "Awards" column of Appendix A.

4. That the contemnors, as enumerated above, are all jointly and severally liable to plaintiff Drywall Tapers of Greater New York, Local 1974 in

the amount of $83,978.50 in attorneys fees and disbursements; and

5. That Drywall Tapers of Greater New York, Local 1974 shall be the sole individual or entity with the power or authority to collect and execute on this judgment and that Local 1974 shall distribute all amounts collected pursuant to this judgment to the entities and individuals listed in Paragraphs 1, 2 and 4 above.

6. Interest shall run from January 5, 1989 the date of entry of the original judgment.

Dated: New York, New York
January 2, 1989

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## APPENDIX E-1

## REMEDIES AND SPECIAL PROCEEDINGS

**RULE 65, Injunction**

(d) Form and Scope of Injunction or Restraining Order.

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

**APPENDIX E-2**

Bill of rights; constitution and by-laws of labor organizations

(2) Freedom of speech and assembly

Every member of any labor organization shall have the right to meet the assemble freely with other members, and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided. That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonble rules as to the responsibility of every member toward the organization as an institution

and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

Supreme Court, U.S.
FILED
FEB 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1208

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

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LOCAL 530 OF OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION,

Petitioner,

v.

DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK, LOCAL 1974 OF I.B.P.A.T., AFL-CIO, on its own behalf and on behalf of all persons, etc.,

Respondents.

---

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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# BRIEF FOR RESPONDENT IN OPPOSITION

---

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Of Counsel:
Wendy E. Sloan
Hall & Sloan

23 pp

## QUESTION PRESENTED

1. Where:

(i) a district court has, after a full evidentiary hearing, enjoined a labor union from causing or permitting its members to perform any work at, certain specified and clearly identified jobsites; and

(ii) the labor union nevertheless has asserted jurisdiction over those jobsites and has knowingly and willfully caused and permitted its members to perform work on them, and has taken no steps whatever to prevent its members from performing work on them despite its knowledge that they were doing so; and

(iii) the district court has, on motion duly served upon the labor union and after a further evidentiary

hearing, made specific and detailed findings of fact, finding that the labor union willfully violated the injunctive order by causing and permitting its members to perform work on the specified jobsites; and

(iv) after such finding, the district court has held a further evidentiary hearing and, after such hearing, has made findings and awarded compensatory damages to certain of the claimants in their proven damage amounts; and

(v) the court of appeals has, on review, approved the district court's findings and damage awards;

is it error for the court of appeals to affirm the district court's judgment of contempt?

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

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No. 89-1208

---

LOCAL 530 OF OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION,

Petitioner,

v.

DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK, LOCAL 1974 OF I.B.P.A.T., AFL-CIO, on its own behalf and on behalf of all persons, etc.,

Respondents.

---

# BRIEF FOR RESPONDENT IN OPPOSITION

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## Opinion Below

The Opinion of the Court of Appeals for the Second Circuit is reported at 889 F.2d 389.

## Statement of the Case

There exist in the construction industry both a national Plan for the Settlement of Jurisdictional Disputes and local plans in several cities. One of the latter plans is known as the New York Plan and is applicable to New York City. Both plans are contracts between labor organizations and employers.

The New York Plan is established by, and administered jointly by, the Building Trades Employers' Association of New York City ("BTEA") and the Building and Construction Trades Council of Greater New York ("BCTC"), the former an employer group, the latter a union group. Under the New York Plan, BTEA arbitrates any jurisdictional dispute as to which there has not been a previous award; its award governs assignment of all work of the kind in question on all future jobs; and BCTC's duty is to enforce the award.

In March 1978 the national plan's Hearing Panel rendered a decision establishing what type of drywall taping work would belong to the Painters' Union (and thus to Local 1974) and what kind to the Plasterers' Union (of which Local 530 is an affiliate).

In 1980, BTEA arbitrated a claim by Local 1974 that at a particular jobsite in New York Local 530 was performing work that belonged to Local 1974 pursuant to the Hearing Panel's decision. After an arbitration hearing, BTEA's executive board rendered an award in favor of Local 1974, finding that the work belonged to it, against Local 530. Local 530 had an opportunity to appeal to the organs of the national plan but decided not to do so. The BTEA's decision of June 24, 1980 therefore is final and binding.

The New York Plan provides that each arbitration award shall govern assignment

of all work of the kind in question on future jobs within the City of New York.

Local 1974 instituted this action in 1981, alleging that Local 530 was violating the BTEA's award and that BCTC had failed to enforce the award. In 1983, after continued failure to perform its enforcement function, BCTC was joined as a defendant along with Local 530.

After BCTC had been joined as defendant, BCTC held a hearing upon a request by Local 1974 for enforcement of the BTEA's award with regard to 31 jobsites at which, Local 1974 alleged, Local 530 was causing its members to perform work that was of the kind in question in the BTEA award. After the hearing, BCTC upheld Local 1974 and ordered Local 530 to remove its members from the jobsites.

Local 530 failed to comply with the BCTC's enforcement order and BCTC failed to enforce it. Local 1974 moved in the

district court for an order enjoining Local 530 from permitting its members to perform work on the 31 jobsites.

The district court issued a preliminary injunction, enjoining Local 530:

> ... from asserting jurisdiction over, and from causing or permitting members of such labor union to perform work at, any of the following jobsites within the City of New York: ... [jobsites listed].

The court then set the issue of those 31 jobsites, and one other, for trial, held at the end of January 1984. Following the five-day trial, the court issued an Opinion and permanent injunctive Order, identical in substance to the preliminary injunction, in regard to the 32 jobsites.[1]

Immediately upon issuance of the preliminary injunction, Local 530 moved

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[1] The injunctive orders therefore bear no resemblance whatever to those described in the second and fourth "Questions Presented," as formulated by Local 530.

for a stay of the preliminary injunctive order. In support of its motion, Local 530 submitted an affidavit of its counsel, describing the order as "enjoining Local 530 and its members from performing any work on thirty-one specified job sites within the City of New York," adding that as a result of the injunction the Local 530 members working ont the jobsites "will be out of work" and further stating that under the preliminary injunction

> ... Local 530 members are enjoined from performing any work at the thirty-one affected jobs.
>
> (Emphasis in original).

Upon the district court's denial of its motion, Local 530 moved in the Court of Appeals for a stay, again with an affidavit of its counsel saying that as a result of the order Local 530's members "will be out of work" and ""will be en-

joined from performing any work at the thirty-one affected jobs."

Moscatiello, Local 530's President and Business Agent, subsequently testified that he understood the injunctive orders in those terms: that all Local 530 members would have to stop work on the jobsites.

Local 530 appealed from the permanent injunctive order on February 9, 1984. Without a published opinion, the Court of Appeals unanimously affirmed the permanent injunction on April 13, 1984. No petition for certiorari was filed.

Moscatiello knew or soon learned that Local 530 members were continuing to work on the jobsites. Moreover, two of Local 530's executive board members, and one of its Trustees, were among those continuing to do so. However, aside from a pro forma letter to the membership, he

did nothing to stop them from working on the jobsites.

Local 1974 moved repeatedly to have Local 530 adjudged in contempt. Its first motion was stymied by Local 530's counsel, who falsely represented to the court that the men working on the jobsites had resigned membership in Local 530; see: 17a. After further discovery, however, Local 1974 brought a second motion.

An evidentiary hearing was held before Hon. John L. Caden, United States Magistrate.

After submission of memoranda by counsel, the Magistrate issued a Report and Recommendation ("R&R"), in which he made detailed findings, establishing that Local 530 had violated the injunctive orders. And he found that the violation was willful. Part of his finding was that the lack of effective action by

Local 530 "was due to Local 530's willful avoidance of an order that it found distasteful."

The Magistrate therefore recommended that Local 530, Moscatiello, Local 530's counsel, and certain employers be adjudged in contempt. Each of the contemnors submitted Objections.

On its de novo review, the district court, Hon. Eugene H. Nickerson, Judge, modified the R&R. With regard to Local 530, his findings were substantially identical to those of Magistrate Caden findings 35a-36a, 60a-61a. Judge Nickerson also made additional findings in response to Local 530's Objections; 61a-

76a.[2] His Opinion and Order adopted R&R as modified; 111a.

Judge Nickerson's Opinion referred the matter to Magistrate Caden for assessment of damages; 110a. In 1987-1988, Magistrate Caden conducted a full evidentiary hearing on claims for damages. Subsequently, Magistrate Caden submitted a new R&R, assessing damages suffered by Local 1974's members by reason of Local 530's contempt.[3] It was

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[2] Thus Local 530 is mistaken in suggesting, in its formulation of the third of the "Questions Presented," that "there were no findings in the district court." Local 530 is likewise mistaken in suggesting, in the same Question, that there was no briefing or argument in the court of appeals as to the the contumacious conduct. There was such briefing and argument.

[3] Contrary to the first "Question Presented," as formulated by Local 530, no "penalties" were imposed. However, damages were awarded to those Local 1974 members who proved that they had lost earnings because of the contempt.

Also contrary to Local 530's formulation of that "Question," the injunctive

modified by Judge Nickerson, and adopted as modified.

Local 530, its counsel, and the employers appealed; the Court of Appeals affirmed as to Local 530's contempt but reversed as to the others on the ground of inadequate notice.

## REASONS FOR DENYING THE WRIT

### I.

### The injunctive orders were clear and Local 530 fully understood their meaning

The injunctive orders clearly and unambiguously enjoined Local 530, its officers and persons in concert with it, from "causing or permitting members of such labor union to perform work at" any of the 32 jobsites.

---

orders provided Local 530 clear notice of the conduct prohibited.

The orders thus left no doubt in the minds of those to whom they were addressed. In the affidavit of its counsel, in support ofits motion for a stay, Local 530 itself described the preliminary injunctive order as "enjoining Local 530 and its members from performing any work on thirty-one specified job sites...."

Local 530 thus understood that to be the meaning of the injunctive orders when it appealed from their issuance in 1984. The Court of Appeals affirmed their issuance but Local 530 did not petition this Court for certiorari, nor did it move for rehearing on the issue of their breadth or their meaning. It can hardly complain of them now; See: McComb v. Jacksonville Paper Co., 336 U.S. 187, 192, 69 S.Ct. 497, 93 L.Ed. 599, 604 (1948); Regal Knitwear Co. v. NLRB, 324 U.S. 9, 15, 65 S.Ct. 478, 482, 89 L.Ed. 661, 667 (1944).

But Local 530 consciously and willfully violated the orders; 110a. And see: Point III, infra.

Even if Local 530's present assertions be credited, it willfully chose to "make [its] own determination of what the decree meant" and in so doing "knew [that it] acted at [its] peril." McComb, supra, 336 U.S. at 192.

## II.

## The injunctive orders did not interfere or require Local 530 to interfere with the rights of Local 530's members to join or not join a union

The injunctive orders enjoined Local 530 from asserting jurisdiction over, and from causing or permitting its members to perform work at, certain jobsites. More simply put, they required Local 530 to pull its members off the jobsites.

The orders did not order anyone, or require anyone, or direct Local 530 to

compel anyone to resign membership in Local 530; nor did they require Local 530 to interfere with its members' rights to join or not join any other union.

The orders thus did not in any way infringe or prejudice any of the statutory or constitutional rights of Local 530's members. Cf. NLRB v. Radio and Television Broadcast Engineers Union, Local 212, 364 U.S. 573, 584, 181 S.Ct. 330, 5 L.Ed.2d 302, 309 (1961) (NLRB determination, awarding work to one union as opposed to another, does not violate non-discrimination requirements of §§ 8(a)(2) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158(a)(2) and (3)).

## III.

## Local 530 willfully violated the injunctive orders

Moscatiello and Local 530 knew or soon learned that Local 530's members were working on the jobsites. Moreover, at least three officers of Local 530 -- two executive board members and a Trustee -- were among those working on the jobsites. They continued to work on those jobsites until the jobs ended. But as Moscatiello testified, he "didn't do anything about it." Nor did Local 530 do anything about it.

There was much that Local 530 could have done, and was under an obligation to do, to see to it that the injunctive orders were obeyed. For example, it could have disciplined, or threatened with discipline, members who violated it. Cf. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S.

175, 196, 87 S.Ct. 2001, 18 L.Ed.2d 1123 (1967); Scofield v. NLRB, 394 U.S. 423, 89 S.Ct. 1154, 22 L.Ed.2d 385 (1969). Nor would such discipline have violated any law or public policy; cf. Pattern Makers' League v. NLRB, 473 U.S. 95, 102, 105 S.Ct. 3064, 87 L.Ed.2d 68, 74 (1985).

But Local 530 did nothing -- except send a pro forma letter advising members of the injunctions.

Magistrate Caden, after a lengthy evidentiary hearing, found that the lack of effective action by Local 530 "was due to Local 530's willful avoidance of an order that it found distasteful."

The Magistrate thus found that Local 530 had violated the injunctive orders. His finding that the violation was "willful" is in accord with the ordinary meaning of that term, see: McLaughlin v. Richland Shoe Company, 486 U.S. ___, ___,

108 S.Ct. 1677, 1681, 100 L.Ed.2d 115, 123 (1988).

Judge Nickerson, reviewing Magistrate Caden's Report de novo, approved that finding; 35a-38a, 61a, 110a. On Local 530's motion for rehearing, Judge Nickerson adhered to that finding.

The Court of Appeals, on Local 530's appeal, approved that finding; 13a-17a, 21a. And it adhered to it on Local 530's motion for rehearing; 27a.

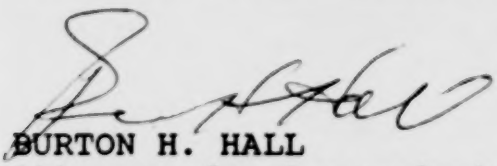
In short, two courts have, with much deliberation, made or approved factual findings of Local 530's violation of the injunctive orders. Those findings should not be reviewed anew on certiorari. cf. Goodman v. Lukens Steel Co., 482 U.S. 656, 665, 107 S.Ct. 2617, 2623, 96 L.Ed.2d 572, 584 (1987); United States v. Doe, 465 U.S. 605, 613-614, 104 S.Ct. 1237, 1242-1243, 79 L.Ed.2d 552 (1984); Rogers v. Lodge, 458 U.S. 613,

623, 102 S.Ct. 3272, 73 L.Ed.2d 1012, 1021 (1982); Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275, 69 S.Ct. 535, 538, 93 L.ed. 672, 676-677 (1949).

## Conclusion

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,



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February 14, 1990